Supreme Court, U.S.
FILED
99 596 OCT - 5 1999
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No. 99-___

In The

Supreme Court of the United States

GEORGE MASON UNIVERSITY,

Petitioner,

v.

UNITED STATES OF AMERICA and
ANNETTE GRECO LITMAN,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit**

PETITION FOR WRIT OF CERTIORARI

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93 pp

QUESTION PRESENTED

May Congress require a State to waive its sovereign immunity as a condition of receiving federal funds?

PARTIES TO THE PROCEEDINGS

The Petitioner is George Mason University, a public university of the Commonwealth of Virginia located in Fairfax, Virginia. The Respondents are the United States of America, which intervened in the U.S. District Court for the purpose of defending the federal constitutionality of 42 U.S.C. § 2000d-7(a)(1), and Ms. Annette Greco Litman, who filed suit against George Mason University and other defendants in the U.S. District Court. Because this proceeding is essentially a conflict between the Commonwealth of Virginia and the United States over the scope of the powers of Congress and not a conflict over Ms. Litman's allegations against the University, the United States is listed first in the caption. *See* Robert L. Stern, Eugene Gressman, Stephen M. Shapiro, & Kenneth S. Geller, *Supreme Court Practice* § 6.18 (7th ed. 1993) (caption should be accurate portrayal of the adversary position of the parties).

Dr. Eugene M. Norris is a defendant in the action in the U.S. District Court. With the agreement of Ms. Litman, the claims against him have been held in abeyance. Dr. Geoffrey Orsak was a defendant in the U.S. District Court. However, all claims against him have been dismissed. Mr. Girard Mulherin was also a defendant in the U.S. District Court. The U.S. District Court entered summary judgment in his favor. Dr. Norris, Dr. Orsak, and Mr. Mulherin were not parties in the U.S. Court of Appeals for the Fourth Circuit and are not parties to the proceedings in this Court.

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PETITION FOR WRIT OF CERTIORARI

George Mason University, by and through its counsel, the Attorney General of the Commonwealth of Virginia, respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINION BELOW

The opinion of the U.S. Court of Appeals for the Fourth Circuit is reported as *Litman v. George Mason University*, ___ F.3d ___ (4th Cir. 1999). It is reprinted in the Appendix to the Petition for Writ of Certiorari on pages 1-26. The opinion of the U.S. District Court for the Eastern District of Virginia, Alexandria Division, is reported as *Litman v. George Mason University*, 5 F. Supp. 2d 366 (E.D. Va. 1998). It is reprinted in the Appendix to the Petition for Writ of Certiorari on pages 27-55.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Fourth Circuit was entered on July 28, 1999. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

1. The Spending Clause of the United States Constitution, U.S. Const. art. I, § 8, cl. 1, provides: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States."

2. The Tenth Amendment to the United States Constitution, U.S. Const. amend. X, provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[1]

3. The Eleventh Amendment to the United States Constitution, U.S. Const. amend. XI, provides: "The judicial power of the United States shall not be construed to

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[1] The nature of the Tenth Amendment is clear. As this Court observed: "The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which, as we have discussed, is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on an Article I power." *New York v. United States*, 505 U.S. 144, 156-57 (1992). Moreover, the Tenth Amendment is not the exclusive textual source of protection for principles of federalism. *See Printz v. United States*, 521 U.S. 898, 953 n.13 (1997).

extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State."[2]

4. The federal statute at issue, 42 U.S.C. § 2000d-7(a)(1), provides: "A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal Court for a violation of Section 504 of the Rehabilitation Act, Title IX of the Education Amendments of 1972, the Discrimination Act of 1975, Title VI of the Civil Rights Act of 1964, or the provisions of any other Federal statutes prohibiting discrimination by recipients of Federal financial assistance."

STATEMENT OF THE CASE

In 1787, George Mason refused to sign the United States Constitution because he feared that the proposed charter did not sufficiently restrain the National Government. In 1999, a public University named for George Mason asks this Court to delineate the Constitution's limits on the National Government vis-à-vis the States.[3]

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[2] While the Eleventh Amendment confirms the existence of the States' sovereign immunity, "the sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment." *Alden v. Maine*, 119 S. Ct. 2240, 2246 (1999).

[3] George Mason University, like all state-supported institutions of higher education in Virginia, is the Commonwealth for purposes of sovereign immunity. *See Richard Anderson Photography v. Brown*, 852 F.2d 114 (4th Cir. 1988).

Specifically, the University asks this Court to determine whether Congress may use the Spending Clause "to obliterate distinctions between national and local spheres of interest and power by permitting the federal government to set policy in the most sensitive areas of traditional state concern, areas which otherwise would lie outside its reach." *Davis v. Monroe County Bd. of Educ.*, 119 S. Ct. 1661, 1677 (1999) (Kennedy, J., joined by Rehnquist, C.J., Scalia, and Thomas, JJ., dissenting). This issue is of enormous consequence. As Justice O'Connor observed, "[i]f the spending power is to be limited only by Congress' notion of the general welfare, the reality, given the vast financial resources of the Federal Government, is that the Spending Clause gives 'power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed.' " *South Dakota v. Dole*, 483 U.S. 203, 217 (1987) (O'Connor, J., joined by Brennan, J., dissenting) (quoting *United States v. Butler*, 297 U.S. 1, 78 (1936)) (internal quotation marks original).

This question regarding the scope of Congress' power vis-à-vis the States centers on 42 U.S.C. § 2000d-7(a)(1). That statute requires a State to waive its sovereign immunity from private actions to recover money damages for violations of certain federal laws as a condition of receiving federal funds. *See Lane v. Peña*, 518 U.S. 187, 198 (1996). The issue in this proceeding is whether Congress may constitutionally impose such a requirement on the States.

A. FACTUAL BACKGROUND

This conflict between the University and the United States over the powers of the National Government arises out of Annette Greco Litman's allegations that the University violated federal law. Ms. Litman took several courses in the University's "extended studies" program. In the autumn of 1995, she enrolled in a computer science class taught by Dr. Eugene Norris. Shortly thereafter, Ms. Litman also accepted a position as Dr. Norris' research assistant. During the period while she was Dr. Norris' student and research assistant, Ms. Litman alleges that Dr. Norris engaged in sexual harassment of her.[4] Ms. Litman did not report any of this alleged sexual harassment to the University.

In January 1996, Ms. Litman ended her research position with Dr. Norris. Nevertheless, Ms. Litman claims that Dr. Norris continued to bother her.[5] On February 15, 1996, Ms. Litman filed a sexual harassment complaint against Dr. Norris with the University Equity Office.[6] On

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[4] Ms. Litman claims that the sexual harassment began with Dr. Norris paying extra attention to her and sitting close to her, and escalated to the point that, when they would have lunch together, Dr. Norris initiated intimate conversations. Ms. Litman claims that this culminated, in November 1995, in Dr. Norris' telling her that he was falling in love with her.

[5] After Ms. Litman resigned as his research assistant, Dr. Norris allegedly sent Ms. Litman an e-mail suggesting that she should marry him. Dr. Norris also allegedly obtained Ms. Litman's schedule and showed up outside classrooms where he knew that she would be present.

[6] The University Equity Office immediately contacted Dr. Norris and asked him to cease contact with Ms. Litman. Dr.

October 7, 1996, a faculty disciplinary panel heard Ms. Litman's complaint against Dr. Norris.[7] The disciplinary panel found that Dr. Norris had not violated the University's sexual harassment policy, but had failed to live up to University "standards" related to that policy. Disciplinary sanctions were not imposed against Dr. Norris.

B. PROCEDURAL BACKGROUND

On October 31, 1997, Litman filed suit in the U.S. District Court for the Eastern District of Virginia, Alexandria Division. Although Ms. Litman sued the University and three individuals under a variety of theories,[8]

Norris agreed. Having stopped the alleged harassment, the Equity Office regarded the matter as closed. Ms. Litman regarded this result as unsatisfactory and initially urged that her complaint be investigated and that Dr. Norris be disciplined. Ms. Litman later dropped this demand, but in late April renewed it. The Equity Office subsequently investigated the matter.

[7] In May 1996, two faculty members, Dr. Geoffrey Orsak and Dr. Bernd-Peter Paris, filed a complaint against Ms. Litman in the Equity Office. The faculty members alleged that Ms. Litman had been sexually harassing them. Ms. Litman was found guilty. She was barred from taking any other extended studies courses, academic sanctions were imposed regarding her incomplete grades, and she was forbidden to enter any University campus or to speak with any of the faculty involved.

[8] Ms. Litman sued Dr. Norris for violation of 42 U.S.C. § 1983 and the state law tort of intentional infliction of emotional distress. Those claims are still pending, but have been stayed pending the resolution of the sovereign immunity issue.

In addition, Ms. Litman sued the University, Dr. Geoffrey Orsak, one of the faculty members who had accused her of sexual harassment, and Dean Mulherin, the administrator in

her primary claim against the University was a violation of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-88.[9] Ms. Litman invoked jurisdiction pursuant to 28 U.S.C. § 1331 (general federal question).[10]

The University moved to dismiss on sovereign immunity grounds.[11] Although Congress, by enacting

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charge of student disciplinary proceedings, alleging various constitutional violations related to the disciplinary hearings against her. All of those claims, except one claim against Dean Mulherin, were dismissed in January 1998. The U.S. District Court granted Dean Mulherin's Motion for Summary Judgment in May 1998.

[9] Ms. Litman brought two separate Title IX claims. First, because a University employee, Dr. Norris, allegedly harassed her, she claimed that the University had violated Title IX. Second, because other University employees brought disciplinary charges against her and otherwise allegedly treated her badly, she asserts that the University has violated Title IX.

[10] This statement is intended to meet the requirements of Sup. Ct. R. 14.1(g)(ii) concerning federal jurisdiction in the first instance.

[11] At the time of the U.S. District Court proceedings, this Court had not yet decided *Gebser Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998). If the deliberate indifference standard of *Gebser* had been applied to Ms. Litman's Complaint, the Complaint likely would have been dismissed for failure to state a claim. However, at the time of the U.S. District Court proceedings, the law in the Fourth Circuit was that educational institutions were liable under Title IX for their employee's acts of sexual harassment. *See Preston v. Virginia ex rel. New River Community College*, 31 F.3d 203, 207 (4th Cir. 1994) ("Title VII, and the judicial interpretations of it, provides a persuasive body of standards to which we may look in shaping the contours of a private right of action under Title IX"); *Kadiki v. Virginia Commonwealth Univ.*, 892 F. Supp. 746, 754 (E.D. Va. 1995).

§ 2000d-7, clearly attempted to abrogate sovereign immunity for Title IX claims, the University, relying on this Court's decisions in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), and *City of Boerne v. Flores*, 521 U.S. 507 (1997), contended that this attempt at abrogation was unconstitutional. Because the University was contending that an Act of Congress was unconstitutional, the District Court, pursuant to 28 U.S.C. § 2403(a), notified the Attorney General of the United States and allowed the United States to intervene in the matter to defend the constitutionality of § 2000d-7.

The District Court agreed with the University and held that 42 U.S.C. § 2000d-7(a)(1) was unconstitutional to the extent that it purported to *abrogate* sovereign immunity for certain federal statutes. Pet. App. at 43. However, the District Court went on to hold that § 2000d-7(a)(1) required waiver of sovereign immunity as a condition of receiving federal funds. The District Court reasoned that while "Congress does not have the authority pursuant to its Article I powers to simply *abrogate* the States' Eleventh Amendment immunity, Congress does have the power to require the States to *waive* their immunity pursuant to a valid exercise of its spending power." Pet. App. at 45. The District Court also emphasized that the State's sovereign immunity presented no "independent constitutional bar" to Congress' employing its spending power in this manner. Pet. App. at 48 (internal quotation marks omitted).

On appeal, the Fourth Circuit did not address whether Congress' attempt to abrogate sovereign

immunity is constitutional.[12] Instead, it focused exclusively on the waiver issue. After concluding that § 2000d-7 required the States to waive their sovereign immunity, the Fourth Circuit then turned to the issue of whether Congress could impose such a condition. The Fourth Circuit's analysis of the issue is brief. In its entirety, the analysis reads as follows:

> [The University's] second argument, that Congress cannot employ its spending power in a manner that conditions a state's receipt of funding upon a waiver of Eleventh Amendment immunity, is also without merit under *current Supreme Court jurisprudence*. While the Supreme Court in [Dole] noted that the spending power "may not be used to induce the States to engage in activities that would themselves be unconstitutional," such as conditioning a grant of federal funds "on invidiously discriminatory state action or the infliction of cruel and unusual punishment," it stated that *the range of permissible conditions extended beyond the original enumerations of congressional power granted by the Constitution. Thus, while abrogating Eleventh Amendment immunity would be impossible unless exercised under the Fourteenth Amendment, conditioning federal funds on an unambiguous waiver of a state's Eleventh Amendment immunity is as permissible as a state's direct waiver of such immunity.* Thus, when a condition under the Spending Clause includes an unambiguous waiver of

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[12] Because a denial of sovereign immunity is considered a final judgment under the collateral order doctrine, *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993), the University was able to appeal immediately.

> Eleventh Amendment immunity, the condition is constitutionally permissible as long as it rests on the state's voluntary and knowing acceptance of it.

Pet. App. at 20-21 (emphasis added) (citations omitted). In sum, the Fourth Circuit characterized this Court's *current* Spending Clause jurisprudence as holding that Congress may use its Spending Clause power to achieve ends that it could not otherwise achieve using its other Article I powers. Therefore, under the Fourth Circuit's interpretation of *current* Spending Clause jurisprudence, Congress could require waiver of sovereign immunity as a condition of receiving federal funds.

REASONS FOR GRANTING THE PETITION

Certiorari is warranted to resolve a conflict between the courts of appeal, *see Lehman v. Lycoming County Children's Services Agency*, 458 U.S. 502, 507 (1982), as well as to consider a question of exceptional importance concerning the scope of Congress' constitutional powers. *See United States v. Lopez*, 514 U.S. 549, 552 (1995).

First, there is a conflict between the courts of appeal. In the present case, the Fourth Circuit held that § 2000d-7 *is constitutional* to the extent that it requires a State to waive its sovereign immunity as a condition of receiving federal funds. In *Bradley v. Arkansas*, ___ F.3d ___, 1999 WL 673228 (8th Cir. 1999), the Eighth Circuit held that § 2000d-7 *is unconstitutional* to the extent that it requires a State to waive its sovereign immunity as a condition of receiving federal funds.

Second, the issue of whether Congress can use the Article I Spending Clause to require surrender of a State's sovereign immunity warrants immediate review by this Court. In our Union, sovereignty is divided between the States and the National Government. Among the attributes of sovereignty retained by the States is immunity from private party suits for damages. This Court has held that Congress may not use its Article I power to diminish the sovereign immunity of the States. Yet, according to the Fourth Circuit, Congress may use its Article I Spending Clause power to exact a waiver of sovereign immunity.

The issue cannot be avoided by relying on an alternative basis for the Fourth Circuit's judgment. Although the Respondents may contend that § 2000d-7 is a valid *abrogation* of sovereign immunity for various federal claims and, thus, that there is an alternative basis for holding that sovereign immunity does not apply, such a contention must be rejected. Under this Court's decision in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 119 S. Ct. 2199, 2206-07 (1999), § 2000d-7 is unconstitutional to the extent that it purports to abrogate sovereign immunity for various federal claims.

I. THE CONFLICT BETWEEN THE COURTS OF APPEAL DEMANDS REVIEW BY THIS COURT.

There is a conflict between the courts of appeal. Both the Fourth Circuit and the Eighth Circuit have addressed the question of whether § 2000d-7 is constitutional to the extent that it requires a State to waive its sovereign

immunity as a condition of receiving federal funds. However, the two courts of appeal reached opposite results.

In this case, the Fourth Circuit concluded that § 2000d-7 *is constitutional* to the extent that it required waiver of sovereign immunity as a condition of receiving federal funds. The Fourth Circuit reasoned:

> [W]hile abrogating Eleventh Amendment immunity would be impossible unless exercised under the Fourteenth Amendment, conditioning federal funds on an unambiguous waiver of a state's Eleventh Amendment immunity is as permissible as a state's direct waiver of such immunity. Thus, when a condition under the Spending Clause includes an unambiguous waiver of Eleventh Amendment immunity, the condition is constitutionally permissible as long as it rests on the state's voluntary and knowing acceptance of it.

Pet. App. at 20-21. However, in *Bradley*, the Eighth Circuit concluded that § 2000d-7 is unconstitutional to the extent that it required waiver of sovereign immunity as a condition of receiving federal funds. The Eighth Circuit reasoned:

> We next consider whether Arkansas waived its Eleventh Amendment immunity with respect to claims arising under § 504 by accepting federal funds. Examining the Supreme Court's decisions in *Atascadero [State Hosp. v. Scanlon]* and *Pennhurst State School & Hospital v. Halderman*, we find three requirements that must be satisfied if a state's participation in a federal spending program is to be held to constitute a waiver of the state's Eleventh Amendment immunity against claims arising under that program. The

three requirements are: (1) the federal spending program must represent a valid exercise of Congress' spending power; (2) the statute creating the federal spending program must contain a clear, unambiguous warning that Congress intends to exact waiver of Eleventh Amendment immunity as a condition for participating in the program; and (3) the state must have participated in the federal spending program.

Section 504 fails the first requirement because it is not a valid exercise of Congress' spending power. *College Savings* recognizes that Congress may require states to comply with conditions to receive federal funds, including waiving their Eleventh Amendment immunity. *College Savings* warns, however, that "the financial inducements offered by Congress might be so coercive as to pass the point at which pressure turns into compulsion." There are also limitations on the conditions that Congress may impose on a state's receipt of federal funds. One of these limitations is that "conditions must . . . bear some relationship to the purpose of the federal spending; otherwise, of course, the spending power could render academic the Constitution's other grants and limits of federal authority."

Section 504 and its abrogation provision impose overly broad conditions on state agencies such as the [Arkansas Department of Education]. Section 504 prohibits "any program or activity receiving federal funding" from treating an individual differently "solely by reason of" that person's disabilities. "Program or activity" is defined broadly to include "all of the operations" of state departments, agencies, or instrumentalities. With these provisions, § 504

> mandates that Arkansas waive its Eleventh Amendment immunity to all claims arising under § 504 if it receives any federal funding, even funding unrelated to the state's obligations to comply with § 504 or the rest of the RA.
>
> Congress' imposition of such conditions on a state violates the Constitution because it amounts to impermissible coercion: Arkansas is forced to renounce all federal funding, including funding wholly unrelated to the RA, if it does not want to comply with § 504. Congressional imposition of such a condition does not give Arkansas, or any other state, a meaningful choice regarding whether to receive federal funding and waive its Eleventh Amendment immunity to suits arising under § 504 or reject funding and retain its Eleventh Amendment immunity to such suits.
>
> The condition § 504 imposes on recipients of federal funds exceeds the ordinary quid pro quo involved in a proper exercise of Congress' spending power. Therefore, § 504 is not a valid exercise of Congress' spending power, and Arkansas by receiving federal funds did not waive its Eleventh Amendment immunity to suits arising from alleged violations of § 504.

Bradley, ___ F.3d at ___, 1999 WL 673228 at *10-11 (citations omitted). In sum, the Eighth Circuit found that the waiver required by § 2000d-7 is too broad and, thus, unconstitutional. A State is forced to choose between waiving its sovereign immunity for claims under the Rehabilitation Act and losing all federal funds for all aspects of its operations including those aspects that are totally unrelated to compliance with the Rehabilitation Act. Such a condition amounts to nothing more than an

attempt to use the Spending Clause as a means of regulating the States.

Although the Eighth Circuit was evaluating § 2000d-7 in the context of the Rehabilitation Act, the analysis is the same for § 2000d-7 in the context of Title IX. Like the Rehabilitation Act, Title IX broadly defines "program or activity" to include "all of the operations" of a State's departments, agencies, or instrumentalities. *See* 20 U.S.C. § 1687. With these provisions, Title IX mandates that a State waive its sovereign immunity for all claims arising under Title IX if it receives *any* federal funding, even funding unrelated to the State's obligations to comply with Title IX. The imposition of such condition on a State exceeds Congress' powers under the Spending Clause.[13]

Of course, in *Bradley*, the Eighth Circuit, relying on its earlier opinion in *Little Rock Sch. Dist. v. Mauney*, 183

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[13] Because the University did not use the language of coercion in its briefs before the District Court and Fourth Circuit, the Respondents may well assert that the University cannot argue coercion before this Court. Such an assertion elevates semantics to substance and must be rejected. First, arguments regarding sovereign immunity can be raised at any stage of the proceedings. *See Ford Motor Co. v. Department of the Treasury*, 323 U.S. 459, 467 (1945). Since the University could raise the sovereign immunity argument for the first time in proceedings before this Court, it is irrelevant what the University argued below with respect to sovereign immunity. Second, in both the District Court and the Fourth Circuit, the University explicitly argued that § 2000d-7 was unconstitutional to the extent that it required waiver of sovereign immunity as a condition of receiving federal funds. The University seeks to argue the same issue before this Court. The fact that the University's argument in this Court uses different rhetoric is inconsequential.

F.3d 816, 831-32 (8th Cir. 1999), also held that 20 U.S.C. §§ 1403 and 1415 require a State to waive its sovereign immunity as a condition of receiving federal funds under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1401-85, and that this requirement of a waiver is constitutional. *See Bradley*, ___ F.3d at ___, 1999 WL 673228 at *6. However, the Eighth Circuit's holding with respect to §§ 1403 and 1415 does not represent agreement with the Fourth Circuit's broad holding that Congress may require waiver of sovereign immunity as a condition of receiving federal funds. As the Eighth Circuit implicitly recognized, there is a fundamental difference between the waiver required by 20 U.S.C. §§ 1403 and 1415 and the waiver required by § 2000d-7. The waiver required by §§ 1403 and 1415 forces a State to choose between waiving its sovereign immunity for claims under a single federal statute, the IDEA, and foregoing funds to implement the IDEA. Thus, a State could refuse to waive its sovereign immunity for IDEA and still receive federal funds for all purposes other than the IDEA. There is a close nexus between the waiver of sovereign immunity for IDEA claims and the expenditure of IDEA funds. In contrast, the waiver required by § 2000d-7 forces a State to choose between waiving its sovereign immunity for all claims under a variety of federal statutes and foregoing federal funds for *all aspects of its operations*. Thus, if a State refuses to waive its sovereign immunity for a variety of federal anti-discrimination claims, it loses *all* federal funds for *all* programs including those totally unrelated to the enforcement of federal anti-discrimination law. There is no nexus between the waiver of sovereign immunity for various

federal anti-discrimination claims and all operations of a State. Such a requirement is nothing more than an attempt to regulate a State by forcing it to waive sovereign immunity.

This conflict between the courts of appeal can be resolved by limiting Congress' Spending Cause power vis-à-vis the States. In her *Dole* dissent, Justice O'Connor noted a fundamental difference between Congress imposing specific requirements on how money should be spent and Congress attempting to impose conditions that were only tangentially related to the expenditure of funds.[14] As Justice O'Connor observed:

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[14] *Dole* involved the issue of whether Congress could require the States to pass a law raising the drinking age to twenty-one as a condition of receiving federal funds. In upholding such a requirement, this Court expressly rejected the idea that the Constitution's structure limited the Spending Clause power vis-à-vis the States. *Dole*, 483 U.S. at 209-10.

To the extent it holds that the structure of the Constitution does not limit the exercise of the Spending Clause vis-à-vis the States, *Dole* should be limited. Instead, this Court should return to the general principles of *Butler*. In *Butler*, this Court held that the reach of the spending power "is not limited by the direct grants of legislative power found in the Constitution." *Butler*, 297 U.S. at 66. However, this Court also held that the application of the statute to the States violated the principles confirmed by the Tenth Amendment. *Id.* at 73. Thus, *Butler* recognized that the National Government has the power to achieve ends not explicitly articulated in Article I, but also recognized that the Constitution's structure limits Congress' Article I powers vis-à-vis the States. In her *Dole* dissent, Justice O'Connor laid the intellectual foundations for a return to the principles of *Butler*. *Dole*, 483 U.S. at 215-216 (O'Connor, J., joined by Brennan, J., dissenting).

When Congress appropriates money to build a highway, it is entitled to insist that the highway be a safe one. But it is not entitled to insist as a condition of the use of highway funds that the State impose or change regulations in other areas of the State's social and economic life because of an attenuated or tangential relationship to highway use or safety. Indeed, if the rule were otherwise, the Congress could effectively regulate almost any area of a State's social, political, or economic life on the theory that use of the interstate transportation system is somehow enhanced. If, for example, the United States were to condition highway moneys upon moving the state capital, I suppose it might argue that interstate transportation is facilitated by locating local governments in places easily accessible to interstate highways – or, conversely, that highways might become overburdened if they had to carry traffic to and from the state capital. In my mind, such a relationship is hardly more attenuated than the one which the Court finds supports § 158.

There is a clear place at which the Court can draw the line between permissible and impermissible conditions on federal grants. It is the line identified in the *Brief for the National Conference of State Legislatures et al. as Amici Curiae*:

> "Congress has the power to spend for the general welfare, it has the power to legislate only for delegated purposes. . . . *The appropriate inquiry, then, is whether the spending requirement or prohibition is a condition on a grant or whether it is regulation. The difference turns on whether the requirement specifies in some way how the money should be*

> *spent, so that Congress' intent in making the grant will be effectuated. Congress has no power under the Spending Clause to impose requirements on a grant that go beyond specifying how the money should be spent.* A requirement that is not such a specification is not a condition, but a regulation, which is valid only if it falls within one of Congress' delegated regulatory powers."

Id. at 215-216 (O'Connor, J., joined by Brennan, J., dissenting) (emphasis added, citations omitted, block quotation original). *See also* Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 Colum. L. Rev. 1911, 1962-78 (1995) (further refining the distinction in Justice O'Connor's dissent). Thus, Congress may impose conditions that are closely related to the purpose of the expenditure, but may not impose conditions that are only tangentially related to the purpose of the expenditure. Under Justice O'Connor's analytical framework, the National Government could give money to a State for education and require that a State deliver educational services in a non-discriminatory manner. Such a condition is no different than requiring that federal highway funds be used to build a safe highway. However, under Justice O'Connor's analytical framework, Congress could not require a State to waive sovereign immunity for Title IX claims as a condition of receiving *any* federal money for *any* aspect of governmental operations.[15]

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[15] Moreover, requiring the States to waive their sovereign immunity as a condition of receiving federal funds is *never* constitutional. Immunity from suit by private parties is a

The conflict between the courts of appeal is clear and also has enormous implications for our federal system. The States in the Fourth Circuit face a difficult choice of either surrendering their sovereign immunity or giving up their share of the federal largess. The States in the Eighth Circuit face no such choice. In our Union where all States are on an equal footing, *see Coyle v. Smith*, 221 U.S. 559, 565 (1911), such inequality among the States cannot be tolerated. This Court must resolve the conflict. Accordingly, this Court should grant the Petition for a Writ of Certiorari.

II. THE ISSUE OF WHETHER CONGRESS CAN USE THE SPENDING CLAUSE POWER TO REQUIRE WAIVER OF A STATE'S SOVEREIGN IMMUNITY WARRANTS REVIEW BY THIS COURT.

Even if there were not a conflict between the courts of appeal, the issue of whether Congress can use the Article I Spending Clause to require surrender of a State's sovereign immunity demands immediate review by this Court.

"[T]he Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may

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fundamental aspect of sovereignty. *Alden v. Maine*, 119 S. Ct. 2241, 2246-47 (1999). In essence, a requirement that a State surrender a fundamental aspect of its sovereignty in order to receive federal funds is analogous to a requirement that an individual surrender a vital organ, such as a kidney, as a condition of receiving some public benefit. Quite simply, there are some things that cannot be surrendered through a contract. Consequently, the waiver of sovereign immunity required by §§ 1403 and 1415 is also unconstitutional.

resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." *New York v. United States*, 505 U.S. 144, 187 (1992). *See also The Federalist No. 51*, at 291 (James Madison) (Clinton Rossiter ed. 1961, 1999 prtg.) (suggesting that the National Government would control the States and the States would control the national government). When the States entered our Union, they did so as sovereign entities. *See Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991). Although the States surrendered many of their powers to the new National Government, they retained "a residuary and inviolable sovereignty." *Printz v. United States*, 521 U.S. 898, 918-19 (1997). The fact that the States retained sovereignty is reflected throughout the Constitution's text and the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones. *See id.* at 919. Thus, "the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991).

Among the attributes of sovereignty retained by the States is immunity from suit for money damages by private parties. *See Alden v. Maine*, 119 S. Ct. 2240, 2246-47 (1999). The constitutional rationale for this preservation of sovereign immunity is clear:

> Underlying constitutional form are considerations of great substance. Private suits against nonconsenting States – especially suits for money damages – may threaten the financial integrity of the States. It is indisputable that, at the time of the founding, many of the States could have been forced into insolvency but for their immunity from private suits for money

damages. Even today, an unlimited congressional power to authorize suits in state court to levy upon the treasuries of the States for compensatory damages, attorney's fees, and even punitive damages could create staggering burdens, giving Congress a power and a leverage over the States that is not contemplated by our constitutional design. The potential national power would pose a severe and notorious danger to the States and their resources.

A congressional power to strip the States of their immunity from private suits . . . would pose more subtle risks as well. "The principle of immunity from litigation assures the states and the nation from unanticipated intervention in the processes of government." When the States' immunity from private suits is disregarded, "the course of their public policy and the administration of their public affairs" may become "subject to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interests." While the States have relinquished their immunity from suit in some special contexts – at least as a practical matter – this surrender carries with it substantial costs to the autonomy, the decisionmaking ability, and the sovereign capacity of the States.

A general federal power to authorize private suits for money damages would place unwarranted strain on the States' ability to govern in accordance with the will of their citizens. Today, as at the time of the founding, the allocation of scarce resources among competing needs and interests lies at the heart of the political process. While the judgment creditor of the State may have a legitimate claim for compensation, other

> important needs and worthwhile ends compete for access to the public fisc. Since all cannot be satisfied in full, it is inevitable that difficult decisions involving the most sensitive and political of judgments must be made. If the principle of representative government is to be preserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State, not by judicial decree mandated by the Federal Government and invoked by the private citizen. "It needs no argument to show that the political power cannot be thus ousted of its jurisdiction and the judiciary set in its place."

Id. at 2264-65 (citations omitted).

The decisions of this Court recognize the importance of sovereign immunity in our federal system. While Congress can abrogate the sovereign immunity of the States as a means of enforcing the Fourteenth Amendment, *see Florida Prepaid*, 119 S. Ct. at 2205-06 (1999), and while a State is always free to expressly waive its sovereign immunity, *see College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219, 2223 (1999), Congress cannot use its Article I powers to diminish the sovereign immunity of the States. Indeed, this Court has explicitly held that Article I cannot be used to abrogate sovereign immunity, *see Seminole Tribe*, 517 U.S. at 72-73, or to exact constructive waivers of a State's sovereign immunity, *see College Savings Bank*, 119 S. Ct. at 2229.

Yet, despite the obvious importance of sovereign immunity in our constitutional system and despite this Court's decisions invalidating the National Government's

attempt to diminish sovereign immunity, the Fourth Circuit held that Congress could require the surrender of this fundamental aspect of sovereignty as the price of receiving federal funds. Notwithstanding the fact that this Court has stated that sovereign immunity "restricts the judicial power under Article III, and Article I cannot be used to circumvent limitations placed upon federal jurisdiction," *Seminole Tribe*, 517 U.S. at 72-73, the Fourth Circuit found that the Article I Spending Clause can be used to circumvent limitations upon federal jurisdiction. Although this Court has observed that "[r]ecognizing a congressional power to exact constructive waivers of sovereign immunity through the exercise of Article I powers would also, as a practical matter, permit Congress to circumvent the antiabrogation holding of *Seminole Tribe*," *College Savings Bank*, 119 S. Ct. at 2229, the Fourth Circuit found a congressional power to exact express waivers of sovereign immunity through the exercise of an Article I power. In doing so, the Fourth Circuit not only undermined the holding of *Seminole Tribe*, it made it possible for Congress to eviscerate the holding of *Seminole Tribe* and all other decisions recognizing the structural constraints of our Constitution.

While such a broad view of the Spending Clause power may be consistent with *Dole*, it directly contradicts the principle that, under our Constitution, the National Government is one of enumerated, hence limited, powers. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819). "[T]hat those limits may not be mistaken, or forgotten, the constitution is written." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803). If the Fourth Circuit is correct in its view of the breadth of Spending Clause

power, then "the spending power could render academic the Constitution's other grants and limits of federal authority." *New York*, 505 U.S. at 167.

Moreover, the Fourth Circuit's interpretation is contrary to the doctrine of unconstitutional conditions. Under that doctrine, the government may not require an individual to waive a constitutional right as a condition of receiving a public benefit. Quite simply, if government "may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may be thus manipulated out of existence." *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 594 (1926). Similarly, in § 2000d-7, Congress is requiring a State to surrender a fundamental aspect of its sovereignty as a condition of receiving federal funds. If Congress may compel a State to surrender a fundamental aspect of its sovereignty as a condition of receiving federal funds, then it may also compel the surrender of all aspects of state sovereignty. It is inconceivable that the structural guarantees of federalism in our Constitution may be manipulated out of existence.

The issue of whether Congress may require a State to waive its sovereign immunity as a condition of receiving federal funds goes to the "first principles" of our federal system. *Lopez*, 521 U.S. at 552. Because "the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom," *id.* at 578 (Kennedy, J., joined by O'Connor, J., concurring), this Court must decide the issue. Accordingly, this Court should grant the Petition for a Writ of Certiorari.

III. THERE IS NO ALTERNATIVE BASIS FOR THE LOWER COURT'S JUDGMENT.

Although there is a conflict between the courts of appeal and although this issue goes to the very core of our federal system, the Respondents, nevertheless, may oppose this Petition on the grounds that the decision below is justified on alternative grounds. Specifically, the Respondents may assert that § 2000d-7 constitutes a valid abrogation of sovereign immunity for various federal statutes. If Congress properly has abrogated sovereign immunity, there is no reason to take up the issue of whether Congress could require waiver as a condition of receiving federal funds.

If the Respondents make such a contention, this Court must reject it. Quite simply, under this Court's decision in *Florida Prepaid*, § 2000d-7 is unconstitutional to the extent that it purports to abrogate sovereign immunity for various Spending Clause statutes. *See Bradley*, ___ F.3d at ___, 1999 WL 673228 at *8-10. To illustrate, in order for Congress to abrogate sovereign immunity, Congress must have acted pursuant to § 5 of the Fourteenth Amendment. *See College Savings Bank*, 119 S. Ct. at 2223. However, the mere fact that Congress has invoked § 5 of the Fourteenth Amendment does not mean that it has acted pursuant to § 5 of the Fourteenth Amendment. *See Florida Prepaid*, 119 S. Ct. at 2206. As this Court observed in *Florida Prepaid*, whether an act was passed pursuant to § 5 of the Fourteenth Amendment involves application of the two-part test mandated in *Flores*. Under that test, this Court first must determine whether Congress has explicitly identified conduct *by the States*, which transgresses

the substantive provisions of the Fourteenth Amendment. *See Florida Prepaid*, 119 S. Ct. at 2207. *See also Bradley*, ___ F.3d at ___, 1999 WL 673228 at *5 ("*Florida Prepaid* requires that Congress find that the states themselves are transgressing the constitution."). If there is no pattern of constitutional violations by the States, then Congress has not acted properly and the inquiry ends. *See College Savings Bank*, 119 S. Ct. at 2225-26. Alternatively, if there is a pattern of specific constitutional violations, then the Court must determine if the abrogation of sovereign immunity is a proportionate response to the violations. *Florida Prepaid*, 119 S. Ct. at 2210. If the response is not proportionate, then Congress has not acted properly.

When this analytical framework is applied to § 2000d-7's attempt to abrogate sovereign immunity for various federal claims, there is little doubt that "the statute cannot be sustained as legislation enacted to enforce the guarantees of the Fourteenth Amendment's [Equal Protection] Clause." *Florida Prepaid*, 119 S. Ct. at 2202. First, Congress did not make findings of a specific pattern of violations of the Fourteenth Amendment by the States. Second, even if there were such findings, the response of abrogating sovereign immunity for all claims arising under various federal statutes is not proportionate to any purported constitutional violations. *See Florida Prepaid*, 119 S. Ct. at 2210. Accordingly, § 2000d-7 is unconstitutional to the extent that it purports to abrogate sovereign immunity for various federal claims.

Of course, some courts of appeal have held that 42 U.S.C. § 2000d-7(a)(1) is a constitutional abrogation of various federal claims. *See Lesage v. Texas*, 158 F.3d 213, 217 (5th Cir. 1998), *petition for cert. filed*, 67 U.S.L.W. 3469

(Jan. 11, 1999) (No. 98-1111); *Franks v. Kentucky Sch. for the Deaf*, 142 F.3d 360, 363 (6th Cir. 1998); *Doe v. University of Illinois*, 138 F.3d 653, 658-59 (7th Cir. 1998), *vacated and remanded on other grounds*, 119 S. Ct. 2016 (1999); *Clark v. California*, 123 F.3d 1267, 1271 (9th Cir. 1997), *cert. denied sub nom. Wilson v. Armstrong*, 118 S. Ct. 2340 (1998); *Crawford v. Davis*, 109 F.3d 1281, 1282-84 (8th Cir. 1997). However, those decisions were decided before *Florida Prepaid* and, as a result, failed to apply the two-part test mandated by *Flores*. Had *Florida Prepaid* been decided before *Lesage*, *Franks*, *Doe*, and *Crawford*, the respective courts of appeal would have reached the opposite result.[16]

In sum, because the attempt to abrogate sovereign immunity for various federal claims is unconstitutional under this Court's decision in *Florida Prepaid*, there is no alternative basis for the judgment of the lower court. Since there is no alternative basis for the judgment, the issue of whether Congress may require a State to waive its sovereign immunity as a condition of receiving federal

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[16] The experience of the Eighth Circuit illustrates this point. Just before the announcement of this Court's decision in *Florida Prepaid*, the Eighth Circuit upheld the abrogation of sovereign immunity for claims under the Individuals with Disabilities Education Act. *Little Rock Sch. Dist. v. Mauney*, 183 F.3d 816, 831-32 (8th Cir. 1999). Six weeks later, however, the Eighth Circuit declared that the "abrogation portion of *Mauney* has been undercut by subsequent events that have changed the legal landscape, and we believe that this portion of *Mauney* no longer represents current law." *Bradley*, ___ F.3d at ___, 1999 WL 673228 at *5.

funds is squarely before this Court. Accordingly, this Court should grant the Petition for a Writ of Certiorari.[17]

CONCLUSION

At the end of the day, our Constitution secures the blessings of liberty by dividing sovereignty between the States and the National Government. The decision below allows the National Government to use its superior financial resources to undermine that division of sovereignty. Such a decision demands review by this Court. Accordingly, this Court should **GRANT** the Petition for a Writ of Certiorari.

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[17] This Court may wish to exercise its discretion and direct the parties to brief and argue whether 42 U.S.C. § 2000d-7(a)(1) is a valid exercise of § 5 of the Fourteenth Amendment. *See Payne v. Tennessee*, 498 U.S. 1076 (1991) (Court requested parties to brief an issue not explicitly raised in the Petition). *See also* Robert L. Stern, Eugene Gressman, Stephen M. Shapiro, & Kenneth S. Geller, *Supreme Court Practice* § 6.25(a) (7th ed. 1993).

Respectfully submitted this 4th day of October 1999.

GEORGE MASON UNIVERSITY

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APPENDIX

Annette Greco LITMAN, Plaintiff-Appellee,
United States of America, Intervenor-Appellee,

v.

GEORGE MASON UNIVERSITY,
Defendant-Appellant,

and

Eugene M. Norris; Geoffrey Orsak;
Girard Mulherin, Defendants.
American Civil Liberties Union of Virginia;
Trial Lawyers for Public Justice;
American Association of University Women;
American Association of University
Women Legal Advocacy Fund; American Civil
Liberties Union Women's Rights
Project; National Women's
Law Center, Amici Curiae.

No. 98-1742.

United States Court of Appeals,
Fourth Circuit.

Argued May 5, 1999.

Decided July 28, 1999.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. James C. Cacheris, Senior District Judge. (CA-97-1755-A)

ARGUED: William Eugene Thro, Assistant Attorney General, Office of the Attorney General, Richmond, Virginia, for Appellant. Alan Banov, Washington, D.C.; Seth Michael Galanter, United States Department of Justice, Washington, D.C., for Appellees. ON BRIEF: Mark L. Earley, Attorney General of Virginia, Ronald C. Forehand,

Senior Assistant Attorney General, Office of the Attorney General, Richmond, Virginia, for Appellant. Bill Lann Lee, Acting Assistant Attorney General, Jessica Dunsay Silver, United States Department of Justice, Washington, D.C., for Appellee United States. Mary Bauer, American Civil Liberties Union of Virginia Foundation, Richmond, Virginia; Sarah Posner, Trial lawyers for Public Justice, P.C., Washington, D.C., for Amici Curiae.

Before NIEMEYER, MICHAEL, and TRAXLER, Circuit Judges.

OPINION

NIEMEYER, Circuit Judge:

Annette Litman, a student at George Mason University in Fairfax, Virginia, filed this action against the University and some of its employees, alleging sex discrimination in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq. To justify her suit against a state instrumentality in federal court, Litman relied on 42 U.S.C. § 2000d-7(a)(1), which provides that "[a] State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of . . . title IX of the Education Amendments of 1972."

George Mason University claims with respect to § 2000d-7(a)(1) that (1) Congress lacked the requisite constitutional authority to abrogate its Eleventh Amendment immunity and (2) the provision does not unequivocally effect a voluntary waiver of its Eleventh Amendment immunity. While the district court agreed

with the University that Title IX exceeded Congress' remedial authority under § 5 of the Fourteenth Amendment to abrogate its Eleventh Amendment immunity, the district court upheld 42 U.S.C. § 2000d-7(a)(1) under the Spending Clause of Article I of the Constitution as a lawful condition of the University's voluntary acceptance of federal education funding under Title IX. For the reasons that follow, we affirm.

I

George Mason University ("GMU") is a state-created university "subject at all times to the control of the [Virginia] General Assembly." Va. Code Ann. § 23-91.24. Moreover, the parties agree that GMU is a recipient of federal education funding within the meaning of Title IX, 20 U.S.C. § 1681(a). *See* 20 U.S.C. § 1687.

In her complaint, which supplies us with the facts in this case at the motion to dismiss stage, Annette Litman alleges that in 1995, as a student in GMU's "extended studies" program, she enrolled in a computer science course with Professor Eugene Norris, for whom she also worked as a research assistant. Over the course of the fall semester, Norris became infatuated with Litman, telling her routinely that he loved her and asking questions about her marriage and specifically about her sex life. Norris also stalked Litman, waiting for her after her speech class, on one occasion, to tell her that he "missed her" and that, despite her efforts to avoid him, he "had his ways" of locating her. After Litman terminated her research position with Norris, she received an e-mail

from him stating, "Don't marry someone you can live with, Marry someone you can't live without."

In February 1996, Litman filed a sexual harassment complaint against Norris with GMU's Equity Office, requesting that Norris be reprimanded for his conduct and ordered to stay away from her. The Equity Office ordered Norris to avoid contact with Litman, but it refused to investigate the complaint further, characterizing Litman's allegations of sexual harassment as a "fishing expedition" grounded in conjecture. Finding this response inadequate, Litman sought the intervention of GMU's president. She also circulated a petition urging GMU to investigate Norris' alleged wrongdoings, but GMU failed to undertake the requested investigation.

Unable to locate a professor to supervise her senior research project, Litman maintained that GMU's faculty refused to interact with her once it became known that she had filed a sexual harassment complaint against one of its members. She thereafter sent suggestive and hostile e-mail messages to certain faculty members, resulting in two professors instituting sexual harassment charges of their own against her pursuant to GMU's Student Judicial Code. Following a trial before GMU's University Judicial Board in May 1996, the Board found Litman guilty of these charges and both imposed academic sanctions against her and expelled her from GMU. Litman asserts that the Board's process was so irregular that GMU effectively precluded her from preparing an adequate defense. Litman's complaint against Norris was tried in October 1996 and resulted in a finding that Norris had not violated GMU's sexual harassment policy.

In October 1997, Litman filed this action alleging that GMU and some of its employees discriminated and retaliated against her on the basis of her sex in violation of Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681 *et seq.* Invoking Eleventh Amendment immunity, GMU moved to dismiss the complaint for lack of jurisdiction. Litman responded, maintaining that Congress, through its enactment of the Civil Rights Remedies Equalization Act, 42 U.S.C. § 2000d-7(a)(1), abrogated GMU's Eleventh Amendment immunity, or, alternatively, that GMU waived its immunity as a condition to receiving federal funding under Title IX. When GMU contended that Congress' effort to abrogate GMU's Eleventh Amendment immunity was unconstitutional, the United States intervened, pursuant to 28 U.S.C. § 2403(a), to defend the constitutionality of 42 U.S.C. § 2000d-7(a)(1).

The district court denied GMU's motion to dismiss. Relying on *City of Boerne v. Flores*, 521 U.S. 507 (1997), the court determined that the protections afforded by Title IX differed from those afforded by the Equal Protection Clause of the Fourteenth Amendment in important ways. It concluded first that Title IX regulated both private and state-sponsored conduct, whereas the Equal Protection Clause, by its terms, regulated only state action. Second, it concluded that Title IX reached beyond the Fourteenth Amendment's prohibitions against gender discrimination by imposing liability on funding recipients for "non-intentional (i.e. disparate impact) discrimination." *Litman v. George Mason Univ.*, 5 F.Supp.2d 366, 374 (E.D.Va.1998). The district court accordingly concluded that § 5 of the Fourteenth Amendment did not provide Congress with the authority to abrogate GMU's Eleventh Amendment

immunity. The court went on to hold, however, that GMU waived its Eleventh Amendment immunity by accepting Title IX funding, which was conditioned on the unambiguous waiver of immunity codified in 42 U.S.C. § 2000d-7(a)(1). The court reasoned that while Congress does not have "the authority pursuant to its Article I powers to simply *abrogate* the States' Eleventh Amendment immunity, Congress does have the power to require the States to *waive* their immunity pursuant to a valid exercise of its spending power." *Id.* at 375. Relying on language in *South Dakota v. Dole*, 483 U.S. 203 (1987), and *New York v. United States*, 505 U.S. 144 (1992), the district court also emphasized that the Eleventh Amendment presented no "independent constitutional bar" to Congress' employing its spending power in this manner. *Id.* at 376 (internal quotation marks omitted).

From the district court's denial of GMU's motion asserting Eleventh Amendment immunity, GMU noticed this interlocutory appeal. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993) (holding that "States and state entities that claim to be 'arms of the State' may take advantage of the collateral order doctrine to appeal a district court order denying a claim of Eleventh Amendment immunity").

II

On appeal, GMU contends that notwithstanding the provisions of the Civil Rights Remedies Equalization Act, 42 U.S.C. § 2000d-7(a)(1), which amended Title IX to make explicit that "[a] State shall not be immune under the Eleventh Amendment of the Constitution of the

United States from suit in Federal court for a violation of . . . title IX of the Education Amendments of 1972," it may not be sued in federal court. It argues that in enacting § 2000d-7(a)(1), Congress lacked the power to abrogate Eleventh Amendment immunity through § 5 of the Fourteenth Amendment and also that GMU did not consent to a waiver because "there is nothing in Title IX or in Congress' attempt to abrogate the Eleventh Amendment which states that waiver of the Eleventh Amendment is a condition of receiving federal funds."

Before determining whether Congress' effort to abrogate GMU's Eleventh Amendment immunity is justified by § 5 of the Fourteenth Amendment, we first consider whether GMU consented to waive its Eleventh Amendment immunity as a condition of receiving federal education funds.

The Eleventh Amendment provides in pertinent part that "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State." It is well established that this amendment, despite its express terms, also precludes citizens from bringing suits in federal court against their own states. *See Hans v. Louisiana*, 134 U.S. 1 (1890); *see also Alden v. Maine*, No. 98-436, 1999 WL 412617, at *15 (U.S. June 23, 1999) (emphasizing that the Eleventh Amendment confirms rather than establishes a state's *sovereign* immunity as a constitutional principle and that its sovereign immunity is not limited by the text of the Eleventh Amendment).

By limiting the federal judicial power over the states, the Eleventh Amendment preserves a federal balance and confirms the constitutional design in which each state remains a sovereign entity generally immune from suit. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 58, 72 (1996); *see also Alden*, 1999 WL 412617, at *28 (stating that "[t]he principle of sovereign immunity preserved by constitutional design thus accords the States the respect owed them as members of the federation" (internal quotation marks and citation omitted)). Inherent in this federal structure is the mutual, reciprocating respect for the state and federal sovereigns, and forcing one sovereign to appear against its will in the courts of another violates this respect. *See Seminole Tribe*, 517 U.S. at 54; *see also Alden*, 1999 WL 412617, at *7 (stating that because the "States retain a 'residuary and inviolable sovereignty,' [t]hey are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority of sovereignty" (quoting *The Federalist* No. 39)). Accordingly,

> [t]he Eleventh Amendment does not exist solely in order to prevent federal-court judgments that must be paid out of a State's treasury; it also serves to avoid the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.

Seminole Tribe, 517 U.S. at 58 (internal quotation marks, brackets, and citations omitted).

The immunity guaranteed by the Eleventh Amendment, however, has well-established exceptions also

inherent in the federal structure. First, Congress can abrogate the immunity without state consent if it acts pursuant to a valid exercise of constitutional power sufficient to abrogate the immunity and it unequivocally expresses its intent to do so. *See Seminole Tribe*, 517 U.S. at 55. Because the Fourteenth Amendment was adopted well after both the Eleventh Amendment and the ratification of the Constitution, and was designed to "expand[ ] federal power at the expense of state autonomy," the power granted to Congress by § 5 of the Fourteenth Amendment is recognized to "intrude upon the province of the Eleventh Amendment." *Id.* at 59. Accordingly, Congress may act under the authority of § 5 of the Fourteenth Amendment to abrogate a state's Eleventh Amendment immunity. *See College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, No. 98-149, 1999 WL 412639, at *3 (U.S. June 23, 1999) (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976)).

In addition, the Eleventh Amendment does not preclude the federal government from bringing suit against states in federal court to ensure compliance with federal law. *See Seminole Tribe*, 517 U.S. at 71 n. 14; *United States v. Texas*, 143 U.S. 621, 644-45 (1892). Nor does the Eleventh Amendment preclude a private citizen from suing a state officer in federal court "to ensure that the officer's conduct is in compliance with federal law." *Seminole Tribe*, 517 U.S. at 71 n. 14 (citing *Ex Parte Young*, 209 U.S. 123 (1908)).

Finally, a state may waive its Eleventh Amendment immunity by consenting to be sued in federal court. *See College Savings Bank*, 1999 WL 412639, at *3; *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 267 (1997); *Seminole*

Tribe, 517 U.S. at 63 (acknowledging the "unremarkable . . . proposition that the States may waive their sovereign immunity" (citations omitted)); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985). Permitting such waivers reflects the fact that sovereign immunity is an element of state sovereignty, not a categorical limitation on the federal judicial power. *See Coeur d'Alene Tribe of Idaho*, 521 U.S. at 267 (stating that, because "a State can waive its Eleventh Amendment protection and allow a federal court to hear and decide a case commenced or prosecuted against it," the Eleventh Amendment "enacts a sovereign immunity from suit, *rather than a nonwaivable limit* on the Federal Judiciary's subject-matter jurisdiction" (emphasis added)); *see also* Erwin Chemerinsky, *Federal Jurisdiction* 406 (2d ed.1994) (linking the Eleventh Amendment with principles of sovereign immunity and observing that "[t]raditionally, sovereign immunity could be waived and that principle has carried over to Eleventh Amendment jurisprudence").

A state may waive its immunity in two ways. *See Booth v. Maryland*, 112 F.3d 139, 145 (4th Cir.1997). It may "directly and affirmatively waive its Eleventh Amendment immunity in a state statute or constitutional provision, as long as the provision explicitly 'specif[ies] the state's intention to subject itself to suit in federal court.' " *Id.* (quoting *Atascadero State Hosp.*, 473 U.S. at 241 (brackets in original)). Alternatively, it may "waive its immunity by voluntarily participating in federal spending programs when Congress expresses 'a clear intent to condition participation in the programs . . . on a State's

consent to waive its constitutional immunity.' " *Id.* (quoting *Atascadero State Hosp.*, 473 U.S. at 247 (ellipses in original)).

But because of the Eleventh Amendment's vital role in preserving the federal balance, determinations of whether a State has waived its immunity are subjected to "stringent," exacting standards. *College Savings Bank*, 1999 WL 412639, at *7 (quoting *Atascadero State Hosp.*, 473 U.S. at 241). Thus, a court may not find a waiver absent an "unequivocal indication that the State intends to consent to federal jurisdiction that otherwise would be barred by the Eleventh Amendment." *Atascadero State Hosp.*, 473 U.S. at 238 n. 1; *see also Pennhurst State School v. Halderman ("Pennhurst I")*, 451 U.S. 1, 17 (1981) (citations omitted); *Edelman v. Jordan*, 415 U.S. 651, 673 (1974). "The whole point of requiring a 'clear declaration' by the State of its waiver is to be certain that the State in fact consents to suit." *College Savings Bank*, 1999 WL 412639, at *9. Accordingly, a State cannot be deemed to have waived its Eleventh Amendment immunity constructively even by engaging in activities after Congress has "made clear that such activity would subject [the State] to suit [in federal court]." *Id.* at *4, *9 (overruling *Parden v. Terminal R. Co. of Ala. Docks Dep't*, 377 U.S. 184 (1964)). Similarly, the "mere receipt of federal funds cannot establish that a State has consented to suit in federal court." *Atascadero State Hosp.*, 473 U.S. at 246-47 (citations omitted).

Litman contends in this case that GMU, by accepting federal education funds under Title IX, has, as a condition of receiving those funds, unambiguously waived its Eleventh Amendment immunity. The district court agreed. GMU, on the other hand, contends that while 42 U.S.C.

§ 2000d-7(a)(1) indicates, albeit unconstitutionally, that it is subject to suit in federal court, "there is *nothing* in the text that even remotely suggests that Virginia's public universities must waive the Eleventh Amendment as a condition of receiving federal funds. Indeed, the statute does not even contain the word 'waiver.' " It argues that a statute "must say something like 'as a condition of receiving federal funds under this Act, the States agree to waive their Eleventh Amendment immunity' " and that absent such explicit language, the mere receipt of Title IX funds cannot effect a waiver.

To resolve this dispute, we turn to the applicable statutory provisions to determine whether they provide unambiguously that GMU, by agreeing to receive federal education funds under Title IX, has waived its Eleventh Amendment immunity.

III

The statutory framework applicable to this case is straightforward. Title IX provides that in connection with any education program or activity receiving federal financial assistance, stipulated here to include GMU's program, "[n]o person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination." 20 U.S.C. § 1681(a). The Supreme Court has held that this provision gives a student an implied right of action for sexual harassment by a teacher in such a program, provided the program's officials have "actual notice of, and [have been] deliberately indifferent to, the teacher's misconduct." *Gebser v. Lago Vista Indep. School Dist.*, 118 S.Ct. 1989, 1993 (1998).

Finally, 42 U.S.C. § 2000d-7(a)(1) provides that for a violation of the antidiscrimination edict in § 1681(a), a state "shall not be immune under the Eleventh Amendment . . . from suit in Federal court."

Section 1681(a), which precludes the use of Title IX federal education funds for discriminatory purposes, was enacted under the Spending Clause of the Constitution, U.S. Const. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes . . . to . . . provide for the . . . general Welfare of the United States"). As a federal spending program, it operates "much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." *Pennhurst I*, 451 U.S. at 17; *see also Davis v. Monroe County Bd. of Educ.*, 119 S.Ct. 1661, 1669 (1999) (characterizing Title IX as Spending Clause legislation); *Gebser*, 118 S.Ct. at 1997 (same). In other words, in exercising its spending power, the federal government "condition[s] an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds." *Gebser*, 118 S.Ct. at 1997 (citations omitted); *see also Davis*, 119 S.Ct. at 1670. And it also conditions these funds on the recipient state's consent to be sued in federal court for an alleged breach of the promise not to discriminate. *See* 42 U.S.C. § 2000d-7(a)(1).

Because of the mutuality required in a contractual relationship of this type – the federal grant in exchange for state agreement to attached conditions – the legitimacy of the attached conditions rests "on whether the State voluntarily and knowingly accepts the terms of the 'contract.' " *Pennhurst I*, 451 U.S. at 17 (citations omitted).

Thus, Spending Clause legislation, in contrast to other Article I legislation or § 5 legislation, presents a state with a choice: the state can either comply with certain congressionally mandated conditions in exchange for federal funds or not comply and decline the funds. Similarly, "Congress has no obligation to use its Spending Clause power to disburse funds to the States; such funds are gifts." *College Savings Bank*, 1999 WL 412639, at *12. As the Supreme Court has observed, the attachment of conditions to grants made under the Spending Clause is a "permissible method of encouraging a State to conform to federal policy choices." *New York v. United States*, 505 U.S. 144, 168 (1992). The Court explained,

> If a State's citizens view federal policy as sufficiently contrary to local interests, they may elect to decline a federal grant. If state residents would prefer their government to devote its attention and resources to problems other than those deemed important by Congress, they may choose to have the Federal Government rather than the State bear the expense of a federally mandated regulatory program, and they may continue to supplement that program to the extent state law is not pre-empted. Where Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people.

Id. As a general proposition, therefore, when Congress acts pursuant to its spending power, there is no categorical prohibition against its attaching conditions to grants made to the states. *See College Savings Bank*, 1999 WL 412639, at *12; *New York*, 505 U.S. at 167; *South Dakota v. Dole*, 483 U.S. 203, 206 (1987).

This mechanism for exercising power under the Spending Clause, however, must have limits. Otherwise, Congress "could render academic the Constitution's other grants and limits of federal authority." *New York*, 505 U.S. at 167. Indeed, an unlimited Spending Clause power could circumvent the entire constitutional structure. As Justice O'Connor observed,

> [i]f the spending power is to be limited only by Congress' notion of the general welfare, the reality, given the vast financial resources of the Federal Government, is that the Spending Clause gives "power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed."

South Dakota, 483 U.S. at 217 (O'Connor, J., dissenting) (quoting *United States v. Butler*, 297 U.S. 1, 78 (1936)).

The Supreme Court has recognized at least five such limitations. *First*, the exercise of the spending power must be for the general welfare. *See* U.S. Const. art. I, § 8, cl. 1; *South Dakota*, 483 U.S. at 207. *Second*, if the grant or expenditure is, when made to the states, accompanied by conditions, the conditions must be stated "unambiguously." *South Dakota*, 483 U.S. at 207. *Third*, any conditions imposed must "bear some relationship to the purpose of the federal spending" so that a reasonable nexus exists between the two. *New York*, 505 U.S. at 167; *South Dakota*, 483 U.S. at 207-08; *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (plurality opinion). *Fourth*, the grant or expenditure and the conditions attached to it

may not violate any independent constitutional prohibition. *See South Dakota*, 483 U.S. at 208. And *fifth*, the financial inducement offered by Congress must not be "so coercive as to pass the point at which pressure turns into compulsion." *Id.* at 211 (internal quotation marks and citations omitted); *see also Virginia Dep't of Educ. v. Riley*, 106 F.3d 559, 570 (4th Cir.1997) (en banc) (plurality opinion of Luttig, J.) (finding coercive Congress' withholding of "the entirety of a substantial federal grant on the ground that the States refuse to fulfill their federal obligation in some insubstantial respect rather than submit to the policy dictates of Washington in a matter peculiarly within their powers as sovereign States").

In the context of Title IX as applicable to the case before us, Congress has attached at least two conditions to GMU's receipt of Title IX funding: (1) GMU cannot discriminate on the basis of sex, *see* 20 U.S.C. § 1681(a), and (2) when responding to alleged acts of discrimination, GMU waives its Eleventh Amendment immunity, *see* 42 U.S.C. § 2000d-7(a)(1). This appeal requires us to determine whether these conditions, considered together, fall within the limitations imposed on Congress' Spending Clause power under current Supreme Court jurisprudence.

GMU does not contend that Title IX funds are not spent for the general welfare; that the prohibition of discrimination and the accompanying waiver of Eleventh Amendment immunity are not reasonably related to grants of education funds; or that the attachment of conditions to the funding arrangement is coercive. Rather, it maintains that it did not knowingly waive its Eleventh Amendment immunity because that condition of waiver

was not made unambiguously clear in the text of § 2000d-7(a)(1). That provision, GMU observes, uses neither the term "condition" nor the term "waiver." GMU also contends that Congress may not impose a waiver of Eleventh Amendment immunity as a condition of funding: "it is constitutionally impossible for Congress to require the States to waive the Eleventh Amendment as a condition of receiving federal funds." We address these two points in order.

A

GMU acknowledges that it voluntarily accepts Title IX funding. Indeed, it must apply for federal funds. And in connection with any application, it must assure the Federal Government of its intent to comply with 20 U.S.C. § 1681(a). Implementing regulations provide that each recipient of Title IX funding must enter into a contract of assurance with the Department of Education and thereby manifest its intent to adhere to the conditions imposed by Title IX. *See* 34 C.F.R. § 106.4(a) (providing, in pertinent part, that "[e]very application for Federal financial assistance for any education program or activity shall as condition of its approval contain or be accompanied by an assurance from the applicant or recipient, satisfactory to the Assistant Secretary, that each education program or activity operated by the applicant or recipient and to which this part applies will be operated in compliance with this part"). Thus, in voluntarily accepting federal education funds, GMU is unequivocally put on notice of three conditions: (1) that it may not discriminate in its programs on the basis of sex, *see* 20 U.S.C. § 1681(a); (2) that if it does discriminate on the basis of sex, it may be

sued by a private individual, *see Gebser*, 118 S.Ct. at 1996, 1999; and (3) that in any such suit, it may not assert its Eleventh Amendment immunity, *see* 42 U.S.C. § 2000d-7(a)(1). There can be no doubt that GMU is able "to ascertain what is expected of it" in return for federal education funds. *Pennhurst I*, 451 U.S. at 17.

The Supreme Court appears to have acquiesced in this same construction, characterizing the waiver language of § 2000d-7(a)(1) as unequivocal. In the context of evaluating whether, under § 2000d-7(a)(1), federal agencies, like private entities, would be subject to monetary damages for Rehabilitation Act violations, the Court observed:

> By enacting [42 U.S.C. § 2000d-7(a)(1)], Congress sought to provide the sort of *unequivocal waiver that our precedents demanded.*
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> * * *
>
> Given the care with which Congress responded to our decision in *Atascadero* by crafting an *unambiguous waiver of the States' Eleventh Amendment immunity* in [42 U.S.C. § 2000d-7(a)(1)], it would be ironic indeed to conclude that the same provision "unequivocally" establishes a waiver of the Federal Government's sovereign immunity against monetary damages awards . . . in the remedies provision attached to the *unambiguous waiver of the States' sovereign immunity*.

Lane v. Pena, 518 U.S. 187, 198, 200 (1996) (emphasis added).

Thus, we conclude that Congress succeeded in its effort to codify a clear, unambiguous, and unequivocal

condition of waiver of Eleventh Amendment immunity in 42 U.S.C. § 2000d-7(a)(1). In enacting that section, Congress responded with "care" to "[the Supreme Court's] decision in *Atascadero* by crafting an unambiguous waiver of the state's Eleventh Amendment immunity." *Id.* at 200; *accord Clark v. California*, 123 F.3d 1267, 1271 (9th Cir.1997) (relying on 42 U.S.C. § 2000d-7(a) in the context of holding that California, by accepting federal funds under the Rehabilitation Act, waived its Eleventh Amendment immunity), *cert. denied sub nom. Wilson v. Armstrong*, 118 S.Ct. 2340 (1998). Moreover, any state reading § 2000d-7(a)(1) in conjunction with 20 U.S.C. § 1681(a) would clearly understand the following consequences of accepting Title IX funding: (1) the state must comply with Title IX's antidiscrimination provisions, and (2) it consents to resolve disputes regarding alleged violations of those provisions in federal court.

In reaching this conclusion, we reject GMU's assertion that a statute "must say something like 'as a condition of receiving federal funds under this Act, the States agree to waive their Eleventh Amendment immunity.' " The only difference between GMU's proffered language and that employed in § 2000d-7(a)(1) is that the former is cast in the affirmative (i.e., "the States agree to waive") and the latter in the negative (i.e., "a State shall not be immune"). But this difference in phrasing is of no constitutional import. Using negative rather than affirmative language does not alter the plain meaning of § 2000d-7(a)(1) – that is, by accepting Title IX funding, a state agrees to waive its Eleventh Amendment immunity.

B

GMU's second argument, that Congress cannot employ its spending power in a manner that conditions a state's receipt of funding upon a waiver of Eleventh Amendment immunity, is also without merit under current Supreme Court jurisprudence. While the Supreme Court in *South Dakota* noted that the spending power "may not be used to induce the States to engage in activities that would themselves be unconstitutional," 483 U.S. at 210, such as conditioning a grant of federal funds "on invidiously discriminatory state action or the infliction of cruel and unusual punishment," *id.*, it stated that the range of permissible conditions extended beyond the original enumerations of congressional power granted by the Constitution, *see id.* Thus, while abrogating Eleventh Amendment immunity would be impossible unless exercised under the Fourteenth Amendment, *see Seminole Tribe*, 517 U.S. at 59, conditioning federal funds on an unambiguous waiver of a state's Eleventh Amendment immunity is as permissible as a state's direct waiver of such immunity. *See Alden*, 1999 WL 412617, at *32 ("Nor, subject to constitutional limitations, does the Federal Government lack the authority or means to seek the States' voluntary consent to private suits" (citing *South Dakota*)); *see also College Savings Bank*, 1999 WL 412639, at *12 & n. 2 (suggesting that Congress, in legislating under the Spending Clause, can condition a waiver of sovereign immunity upon the states' acceptance of a federal grant). Thus, when a condition under the Spending Clause includes an unambiguous waiver of Eleventh Amendment immunity, the condition is constitutionally permissible as long as it rests on the state's voluntary and

knowing acceptance of it. *See Atascadero State Hosp.*, 473 U.S. at 238-40; *Pennhurst I*, 451 U.S. at 17.

Accordingly, we conclude that Congress, in enacting 42 U.S.C. § 2000d-7(a)(1), permissibly conditioned GMU's receipt of Title IX funds on an unambiguous waiver of GMU's Eleventh Amendment immunity, and that, in accepting such funding, GMU has consented to litigate Litman's suit in federal court.

IV

The important role that the Eleventh Amendment plays in our federal structure demands that we pause to consider the larger implications of concluding that a state waives its immunity from suit in federal court by accepting Title IX funding. This inquiry is especially important given the recent intensity with which the Supreme Court and this circuit have focused on issues of federalism, separation of powers, and a limited federal government. *See, e.g., Alden v. Maine*, No. 98-436, 1999 WL 412617 (U.S. June 23, 1999); *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, No. 98-149, 1999 WL 412639 (U.S. June 23, 1999); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, No. 98-531, 1999 WL 412723 (U.S. June 23, 1999); *Printz v. United States*, 521 U.S. 898 (1997); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); *United States v. Lopez*, 514 U.S. 549 (1995); *New York v. United States*, 505 U.S. 144 (1992); *Gregory v. Ashcroft*, 501 U.S. 452, 457-59 (1991); *Brzonkala v. Virginia Polytechnic Inst.*, 169 F.3d 820 (4th Cir.1999) (en banc); *Brown v. North Carolina Div. of Motor Vehicles*, 166 F.3d 698 (4th Cir.1999);

Condon v. Reno, 155 F.3d 453 (4th Cir.1998), *cert. granted*, 119 S.Ct. 1753 (1999); *In re Creative Goldsmiths of Washington, D.C., Inc.*, 119 F.3d 1140, 1145 (4th Cir.1997), *cert. denied sub nom. Schlossburg v. Maryland Comptroller of Treasury*, 118 S.Ct. 1517 (1998).

These decisions collectively counsel that we not lightly conclude that principles of federalism and state sovereign immunity permit Congress to employ its spending power in a manner that ultimately effects a waiver of a state's Eleventh Amendment immunity. *See generally Lopez*, 514 U.S. at 578 (Kennedy, J., concurring) ("[T]he federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far"). Specifically, any conclusion we reach today must respect the Supreme Court's admonition in *Seminole Tribe* that the "Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent limitations placed upon federal jurisdiction." 517 U.S. at 72-73. Further, we must acknowledge that "[r]ecognizing a congressional power to exact constructive waivers of sovereign immunity through the exercise of Article I powers would also, as a practical matter, permit Congress to circumvent the antiabrogation holding of *Seminole Tribe*." *College Savings Bank*, 1999 WL 412639, at *11.

We do not intend to question these propositions. However, we do not read *Seminole Tribe* and its progeny, including the Supreme Court's recent Eleventh Amendment decisions, to preclude Congress from conditioning federal grants on a state's consent to be sued in federal

court to enforce the substantive conditions of the federal spending program. Indeed, to do so would affront the Court's acknowledgment in *Seminole Tribe* of "the unremarkable . . . proposition that States may waive their sovereign immunity." 517 U.S. at 65. Furthermore, in *New York* the Court emphasized that principles of federalism do not pose an independent constitutional bar to Congress' powers under the Spending Clause:

> By [employing the spending power to attach conditions on the States' receipt of federal funding], as by any other permissible method of encouraging a State to conform to federal policy choices, the residents of the State retain the ultimate decision as to whether or not the State will comply. If a State's citizens view federal policy as sufficiently contrary to local interests, they may elect to decline a federal grant.

New York, 505 U.S. at 168. If the Supreme Court were one day to adopt a Madisonian construction of the Spending Clause,* perhaps Congress would be inhibited from

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* As an original matter, Alexander Hamilton and James Madison appear to have taken different positions regarding the scope and purposes of the Spending Clause. Hamilton contended that "[t]he terms *'general Welfare'* [as used in the Spending Clause] were doubtless intended to signify more than was expressed or imported in those which Preceded; otherwise numerous exigencies incident to the affairs of a Nation would have been left without a provision." Alexander Hamilton, Report on Manufacturers (Dec. 5, 1791), *reprinted in 2 The Founders' Constitution* 446, 446 (Philip B. Kurland & Ralph Lerner eds., 1987). He reasoned:

> The phrase is as comprehensive as any that could have been used; because it was not fit that the constitutional authority of the Union to appropriate

implementing a spending program that both intruded upon a state's general police powers and conditioned the

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> its revenues shou'd have been restricted within narrower limits than the "General Welfare" and because this necessarily embraces a vast variety of particulars, which are susceptible neither of specification nor of definition.

Id. at 446-47.

Madison, on the other hand, believed that the history underlying the insertion of the "general Welfare" language into the Spending Clause proved Hamilton's construction to be error. He contended that the Framers never "understood [that phrase to] invest Congress with powers not otherwise bestowed by the constitutional charter." Letter from James Madison to Andrew Stevenson (Nov. 27, 1830), *reprinted in 2 The Founders' Constitution, supra,* 453, 456. Madison grounded his construction of the Spending Clause in principles underlying our *federal* order:

> [F]or it exceeds the possibility of belief, that the known advocates in the Convention for a jealous grant and cautious definition of Federal powers should have silently permitted the introduction of words or phrases in a sense rendering fruitless the restrictions and definitions elaborated by them.
>
> Consider for a moment the immeasurable difference between the Constitution limited in its powers to the enumerated objects, and expounded as it would be by the import claimed for the phraseology in question. The difference is equivalent to two Constitutions, of characters essentially contrasted with each other – the one possessing powers confined to certain specified cases, the other extended to all cases whatsoever; for what is the case that would not be embraced by a general power to raise money, a power to provide for the general welfare, and a power to pass all laws necessary and proper to carry these powers into execution; all such provisions and laws superseding,

outlay of funding on a state's waiving its sovereign immunity. In deciding this case, however, we are bound

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> at the same time, all local laws and constitutions at variance with them? Can less be said, with the evidence before us furnished by the journal of the Convention itself, then that it is impossible that such a Constitution as the latter would have been recommended to the States by all the members of that body whose names were subscribed to the instrument?
>
> * * *
>
> The Constitution is a limited one, possessing no power not actually given, and carrying on the face of it a distrust of power beyond the distrust indicated by the ordinary forms of free Government.

Id. at 455, 457.

In *United States v. Butler*, 297 U.S. 1 (1936), albeit in dictum, the Supreme Court appears to have acquiesced in the Hamiltonian position:

> While, therefore, the power to tax is not unlimited, its confines are set in the clause which confers it, and not in those of § 8 which bestow and define the legislative powers of the Congress. It results that the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution.

Id. at 66. The Court confirmed its adoption of the Hamiltonian view one year later in *Steward Machine Co. v. Davis*, 301 U.S. 548, 586-87 (1937) (Cardozo, J.) (upholding New Deal legislation and observing that "[i]t is too late today for the argument to be heard with tolerance that in a crisis so extreme the use of the moneys of the nation to relieve the unemployed and their dependents is a use for any purpose narrower than the promotion of the general welfare" (citing *Butler*, 297 U.S. at 65-66)).

by the Court's existing constructions of the scope of Congress' spending power.

Because we hold that GMU, through its acceptance of Title IX funding, waived its Eleventh Amendment immunity, we need not reach the question of whether Congress can constitutionally abrogate that immunity through § 5 of the Fourteenth Amendment. Accordingly, the judgment of the district court is

AFFIRMED.

APPENDIX

Annette Greco LITMAN, Plaintiff,
v.
GEORGE MASON UNIVERSITY et al., Defendants.

No. Civ.A. 97-1755-A.

United States District Court,
E.D. Virginia,
Alexandria Division.

May 7, 1998.

Annette Kay Rubin, Leesburg, VA, for Annette Greco Litman.

Ronald C. Forehand, Asst. Atty. Gen., Richmond, VA, for George Mason University, Geoffrey Orsak, Girard Mulherin.

James V. Ingold, Fairfax, VA, for Eugene M. Norris.

MEMORANDUM OPINION

CACHERIS, District Judge.

This matter comes before the Court on Defendant George Mason University's ("GMU") Motion to Dismiss Counts I and II; Defendant Dean Girard Mulherin's ("Mulherin") Motion for Summary Judgment; Plaintiff's Motion to Exclude Treating Healthcare Providers from the Requirement of Preparing a Written Report Pursuant to Fed.R.Civ.Pro. 26(a)(2)(B); and Plaintiff's Motion to Reconsider the Court's ruling dismissing her Equal Protection claim as to Defendants Orsak and Mulherin.

I.

Plaintiff Annette Greco Litman ("Litman") began attending GMU in the Summer of 1995 as a student in the extended studies program. In the Fall of 1995, she signed up for a computer science class, taught by Professor Norris. Litman also accepted a position as Norris' research assistant. Litman alleges that Norris misrepresented the course requirements to her and that it therefore became necessary for her to seek extra help from Norris. During the period while she was Norris' student and research assistant, Litman alleges that Norris engaged in a course of behavior towards her that began with his paying extra attention to her and sitting close to her, and escalated to the point that, when they would have lunch together, Norris initiated conversations about Litman's marriage, and, specifically, about her sex life with her husband. Litman alleges that Norris was particularly interested in talking about, for example, the fact that Litman and her husband slept in separate beds. Litman claims that this culminated, in November of 1995, in Norris' telling her that he was falling in love with her.

At this point, Litman alleges that she sought the advice of Professor Orsak, an Associate Professor of Electrical and Computer Engineering at GMU. Litman claims that his only response was to suggest that she report any possible sexual assault to the campus police. In January, 1996, Litman states that she terminated her research position with Professor Norris. After this, Norris allegedly sent Litman an e-mail which read: "Don't marry someone you can live with/ Marry someone you can't live without." At this point, Litman began to suffer mentally and physically from the stress of this situation. Again, she

sought counsel from Orsak, who, this time, referred her to the Student Development Office.

Norris apparently continued to bother Litman, even looking up her schedule using faculty codes and showing up outside classrooms where he knew that she would be present. As this continued, Litman filed a complaint with the Equity Office.

Litman had trouble finding a Professor to advise her work on her Senior Project after she stopped working for Norris. She claims that she was too emotionally distressed to be in personal contact with any professors. At one point, she was contacted by one of her professors, Dr. Paris, for permission to use her homework as an example for the rest of the class. Litman responded by giving her permission but also sending him an e-mail which she states was "suggestive, sarcastic and angry." She later apologized.

For reasons not fully explained in Plaintiff's Complaint, Professors Paris and Orsak filed a complaint against Litman in the Equity Office that spring, reporting that Litman had been sexually harassing them. Litman was upset, and she proceeded to e-mail faculty members about her concerns regarding her treatment by Paris, Orsak, and Norris. Litman also contacted the Equity Office again, and she also circulated a petition regarding her complaints against Norris.

Litman's hearing was scheduled for May 30. She sought to postpone the disciplinary proceedings, claiming that she needed more time due to her emotional distress and the sedatives she was taking for stress. Her request was denied, and the disciplinary proceedings

took place as scheduled on May 30. Dean Mulherin, GMU's Judicial Administrator, was in charge of the proceedings. Litman claims that there were several procedural irregularities, for example, she was not allowed to question Orsak about specific pieces of correspondence which he claimed were harassing. Litman was found guilty. She was permanently expelled from GMU, academic sanctions were imposed regarding her incomplete grades, and she was forbidden to enter any GMU campus or to speak with any of the faculty involved, with the exception of Dean Mulherin.

Litman's sexual harassment claims against Norris were tried on October 17, 1996. The disciplinary panel found that Norris had not violated GMU sexual harassment policy but had failed to live up to GMU "standards" related to that policy. No sanctions were imposed against Norris.

On October 31, 1997, Litman filed her Complaint against GMU, Norris, Orsak, and Mulherin, under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq.; 42 U.S.C. § 1983; and state law. She claimed Gender Discrimination in Violation of Title IX (Against GMU) (Count I); Retaliation in Violation of Title IX (Against GMU) (Count II); Deprivation of Free Speech Rights Under Color of Law (Against Orsak, Mulherin and GMU) (Count III); Deprivation of Due Process Under Color of Law (Against GMU, Orsak and Mulherin) (Count IV); Deprivation of Equal Protection Rights Under Color of Law (Against Norris, Orsak, Mulherin, and GMU) (Count V); and Intentional Infliction of Emotional Distress (Against Norris) (Count VI).

By Order dated January 22, 1998, this Court granted Defendant's Motion to Dismiss Count III; granted Defendants' Motion to Dismiss Count IV in part ("Count IV is Dismissed as against Defendants George Mason University and Orsak, but Count IV remains as against Defendant Mulherin"); granted Defendants' GMU, Orsak, and Mulherin's Motion to Dismiss Count V; and denied Defendant Norris' Motion to Dismiss Counts V and VI. The Court deferred ruling on Defendant GMU's Motion to Dismiss Counts I and II, in order to permit the United States an opportunity to intervene in accordance with 28 U.S.C. § 2403(a). On February 18, the Court granted the United States' motion for intervention of right in order to give the United States the opportunity to be heard on the issue of the constitutionality of the abrogation of states' Eleventh Amendment immunity under Title IX. The Court accepted additional briefs from all parties and heard argument from all parties on the abrogation issue on March 12, 1998.

II.

In support of its motion to dismiss Counts I and II, GMU argues that the Eleventh Amendment deprives this Court of jurisdiction over these claims. Specifically, GMU argues that 42 U.S.C. § 2000d-7 is unconstitutional to the extent that it purports to abrogate the States' Eleventh Amendment immunity for Title IX questions.

A.

"The burden of proving subject matter jurisdiction on a Rule 12(b)(1) motion to dismiss is on the plaintiff, the

party asserting jurisdiction." *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir.1982). "[T]he complaint will be construed broadly and liberally, in conformity with the principle set forth in Rule 8(f), but argumentative inferences favorable to the pleader will not be drawn." 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1350 (1990).

> [S]ubject matter jurisdiction deals with the power of the court to hear the plaintiff's claims in the first place, and therefore imposes upon courts an affirmative obligation to ensure that they are acting within the scope of their jurisdictional power. Accordingly, upon a challenge to the court's jurisdiction by a party, the court should conduct a careful inquiry and make a conclusive determination whether it has subject matter jurisdiction or not, or at least defer the inquiry if it is intertwined with the merits of the case.

Id. (1997 Pocket Part).

B.

In *Seminole Tribe v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996), the Supreme Court held that, notwithstanding Congress' clear intent to abrogate the States' sovereign immunity, the Indian Commerce Clause does not grant Congress that power, and therefore the Indian Gaming Regulatory Act cannot grant jurisdiction over a state that does not consent to be sued. More broadly, in overruling its plurality decision in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 109 S.Ct. 2273, 105 L.Ed.2d 1 (1989) the Supreme Court limited Congress'

authority to abrogate States' Eleventh Amendment immunity to those provisions enacted pursuant to its power under 5 of the Fourteenth Amendment. *Id.* at 1127.

In overruling *Union Gas*, the Supreme Court held that, if Congress attempts to abrogate the States' sovereign immunity pursuant to some other source of Congressional power, such as Congress' Article I powers, then the abrogation is invalid:

> It was well established in 1989 when *Union Gas* was decided that the Eleventh Amendment stood for the constitutional principle that state sovereign immunity limited the federal courts, jurisdiction under Article III. . . . As the dissent in *Union Gas* recognized, the plurality's conclusion – that Congress could under Article I expand the scope of the federal courts' jurisdiction under Article III – 'contradict[ed] our unvarying approach to Article III as setting forth the exclusive catalog of permissible federal court jurisdiction.' Never before the decision in *Union Gas* had we suggested that the bounds of Article III could be expanded by Congress operating pursuant to any constitutional provision other than the Fourteenth Amendment. Indeed, it had seemed fundamental that Congress could not expand the federal courts beyond the bounds of Article III.

Id. at 1127-28 (citation omitted) (emphasis in original).

In order to determine whether Congress' attempt to abrogate States' sovereign immunity for Title IX actions is valid, this Court must follow the two-part test set forth in *Seminole Tribe*. First, the court must ask whether Congress has "unequivocally expresse[d] its intent to abrogate

immunity." *Id.* at 1123. If so, the court must then ask whether Congress has acted "pursuant to a valid exercise of power," that is, pursuant to § 5 of the Fourteenth Amendment. *Id.*

GMU concedes that Congress, by enacting 42 U.S.C. § 2000d-7, has expressed its intention to abrogate the State's Eleventh Amendment immunity for Title IX actions.[1] The issue for the Court is, thus, whether Congress, in purporting to abrogate the Eleventh Amendment for Title IX claims, acted pursuant to § 5 of the Fourteenth Amendment.

"Congress' failure to mention that it acted pursuant to Section Five of the Fourteenth Amendment is not dispositive." *CSX Transportation, Inc. v. Board of Public Works of the State of West Virginia,* 138 F.3d 537 (4th Cir.1998).

> It is in the nature of our review of congressional legislation defended on the basis of Congress's powers under § 5 of the Fourteenth Amendment that we be able to discern some legislative purpose or factual predicate that supports the exercise of that power. That does not mean, however, that Congress need anywhere recite

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[1] "A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C.A. § 794], title IX of the Education Amendments of 1972 [20 U.S.C.A. § 1681 et seq.], the Age Discrimination Act of 1975 [42 U.S.C.A. § 6101 et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal fund assistance." 42 U.S.C.A. § 2000d-7 (1994).

> the words "section 5" or "Fourteenth Amendment" or "equal protection" for "the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise."

EEOC v. Wyoming, 460 U.S. 226, 243 n. 18, 103 S.Ct. 1054, 1064, n. 18, 75 L.Ed.2d 18 (citing *Fullilove v. Klutznick*, 448 U.S. 448, 476-478, 100 S.Ct. 2758, 2773-74, 65 L.Ed.2d 902 (1980); *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144, 68 S.Ct. 421, 424, 92 L.Ed. 596 (1948)). The "appropriate test for determining when Congress intends to enforce the guarantees of the Fourteenth Amendment" when Congress' intent is ambiguous, however, favors a finding that Congress did not intend to act pursuant to its section 5 powers. "Because such legislation imposes constitutional policy on a State involuntarily, and because it often intrudes on traditional state authority, we should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment." *Gregory v. Ashcroft*, 501 U.S. 452, 469, 111 S.Ct. 2395, 2405-06, 115 L.Ed.2d 410 (1991) (citing *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 16, 101 S.Ct. 1531, 1539, 67 L.Ed.2d 694 (1981)).

The Eighth Circuit has relied upon language in *EEOC v. Wyoming* and has fashioned a somewhat different inquiry:

> Because Congress need not expressly invoke the authority of a specific constitutional provision to act pursuant to it, we believe that the latter condition requires us to make an objective inquiry, namely, whether Congress could have enacted the legislation at issue pursuant to a constitutional provision granting it the power to

> abrogate. As long as Congress had such authority as an objective matter, whether it also had the specific intent to legislate pursuant to that authority is irrelevant.

Crawford v. Davis, 109 F.3d 1281, 1283 (8th Cir.1997). *See also Franks v. Kentucky School for the Deaf*, 142 F.3d 360, 1998 WL 193177 (6th Cir.1998); *CSX Transportation*, 138 F.3d 537, 1998 WL 100394 at *2 (4th Cir.1998) (citing *Crawford* with favor).

The questions of whether Congress acted pursuant to its powers under § 5 of the Fourteenth Amendment, or whether it could have acted under its § 5 powers, implicate the Court's recent decision in *City of Boerne v. Flores*, ___ U.S. ___, ___, 117 S.Ct. 2157, 2164, 138 L.Ed.2d 624 (1997). In *Boerne*, the Court held that Congress' power under § 5 of the Fourteenth Amendment is limited to enforcing the substantive guarantees of the Fourteenth Amendment. *Id.* at 2163. "The power granted to Congress by Section Five of the Fourteenth Amendment is limited to the promulgation of remedial or preventive legislation that enforces the provisions of the Fourteenth Amendment and does not extend to substantive legislation that defines the Amendment's restrictions on the states." *CSX Transportation*, 138 F.3d 537, 539 (citing *Boerne*, ___ U.S. at ___, 117 S.Ct. at 2164). Therefore, if § 2000d-7 is substantive rather than remedial, the statute cannot be a valid exercise of Congress's Equal Protection Clause enforcement powers. *Id.* at 540 n. 3, at *2, n. 3. It is important to note that the three Circuit courts who have held that § 2000d-7 is constitutional as a proper exercise of Congress' § 5 enforcement powers did not consider the *Boerne* case. *See Franks v. Kentucky School for the Deaf*, 142 F.3d 360

(6th Cir.1998); *Doe v. University of Illinois*, 138 F.3d 653 (7th Cir.1998) (briefed prior to the Court's decision in *Boerne*); *Crawford v. Davis*, 109 F.3d 1281 (8th Cir.1997) (decided prior to the Court's decision in *Boerne*).

Section 2000d-7 purports to abrogate States' immunity generally and uniformly in suits brought under Title IX, Title VI, the ADEA, the Rehabilitation Act, and "the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance." *See supra*, note 1. In order to determine whether Congress has the authority to abrogate the States' sovereign immunity with respect to Title IX claims, the Court must examine the purpose behind Title IX itself.

Title IX prohibits discrimination on the basis of sex by entities receiving federal funds. The language of Title IX, its legislative history, and analogous case law, demonstrate that Title IX was passed pursuant to Congress' powers under the Spending Clause.

In *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 112 S.Ct. 1028, 117 L.Ed.2d 208 (1992), the Supreme Court expressly declined to determine the constitutional basis for Congress' enactment of Title IX. 503 U.S. at 75, n. 8, 112 S.Ct. 1028, 1038, n. 8, 117 L.Ed.2d 208. However, the Supreme Court has held that Title IX is analogous to Title VI, and that Title VI is Spending Clause legislation. In *Cannon v. University of Chicago*, 441 U.S. 677, 696, 99 S.Ct. 1946, 1957, 60 L.Ed.2d 560 (1979), the Court enumerated the parallels between Title IX and Title VI:

> Title IX was patterned after Title VI of the Civil Rights Act of 1964. Except for the substitution of the word "sex" in Title IX to replace the words

> "race, color, or national origin" in Title VI, the two statutes use identical language to describe the benefited class. Both statutes provide the same administrative mechanism for terminating federal financial support for institutions engaged in prohibited discrimination. Neither statute expressly mentions a private remedy for the person excluded from participation in a federally funded program. The drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been during the preceding eight years.

Cannon, 441 U.S. at 695-96, 99 S.Ct. at 1956-57 (citing legislative history in notes 16-19). The Court found that "Title VI is spending-power legislation." *Guardians Ass'n v. Civ. Serv. Com'n of City of N.Y.*, 463 U.S. 582, 598-99, 103 S.Ct. 3221, 3230-31, 77 L.Ed.2d 866 (1983). Reading *Cannon* and *Guardians* together, it is likely that the Supreme Court would find that Title IX is also spending-power legislation.

The Fifth and Eleventh Circuits have also found that Title IX is an exercise of Congress' spending power. *See Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390, 1397-99 (11th Cir.1997); *Rowinsky v. Bryan Independent School Dist.*, 80 F.3d 1006, 1012-13 and n. 14 (5th Cir.1996). Both circuit courts also relied upon the Supreme Court's decisions in *Cannon* and *Guardian*, and the legislative history of Title IX. The Eleventh Circuit summarized the legislative history of Title IX in support of its argument that Title IX is spending-power legislation:

> When Congress conditions the receipt of federal funding upon a recipient's compliance with federal statutory directives, Congress is acting pursuant to its spending power. The legislative history of Title IX indicates that Congress intended to impose upon recipients of federal educational assistance a requirement of nondiscrimination on the basis of sex. The Spending Clause authorized Congress to impose this condition.
>
> Representative Green put it succinctly: "If we are writing the law, I would say that any institution could be all men or all women, but my own feeling is that they do it with their own funds and not taxpayers' funds." Representative Green also quoted with approval President Nixon, who had stated, "Neither the President nor the Congress nor the conscience of the Nation can permit money which comes from all the people to be used in a way which discriminates against some of the people." To Senator Bayh, the reach of Title IX was clearly restricted to federally funded institutions. In support of Title IX, Senator McGovern stated, "I urge my colleagues to take every opportunity to prohibit Federal funding of sex discrimination." This legislative history clearly shows that Congress intended Title IX to be a "typical 'contractual' spending-power provision."

Davis, 120 F.3d at 1397-98 (citations omitted).

This Court thus finds that it is clear that Congress enacted Title IX pursuant to its powers under the Spending Clause. Even if there is some ambiguity injected into the inquiry by the fact that Title IX addresses subject matter covered by the Fourteenth Amendment, namely

Equal Protection on the basis of sex, this Court will not "quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment." *See Gregory*, 501 U.S. at 469.

The Court recognizes, however, the recent body of case law, framing the proper inquiry as "whether Congress could have enacted the legislation at issue" pursuant to § 5 of the Fourteenth Amendment. *See Crawford*, 109 F.3d at 1283. *See also Franks*, 142 F.3d at ___, 1998 WL 193177; *CSX Transportation*, 138 F.3d 537, 539 (4th Cir.1998) (citing *Crawford* with favor). Because this Court finds that Congress could not have enacted Title IX, or amended Title IX by § 2000d-7 pursuant to its § 5 enforcement powers, Congress' attempt to abrogate States' Eleventh Amendment immunity for Title IX claims is unconstitutional under this test as well.

The protections afforded by Title IX differ from those afforded by the Equal Protection Clause in several important ways. First, and foremost, Title IX is voluntary in nature. Title IX prohibits discrimination on the basis of sex only by entities receiving federal funds. A state agency can discriminate if it chooses to forego federal funds. Similarly, Title IX regulates private schools who choose to receive federal funding.

> The Equal Protection Clause, however, only protects against action by state-sponsored entities. Federal funding does not make a public school a state actor. Thus, if Title IX had been enacted under the Fourteenth Amendment, then the antidiscrimination provision of Title IX would not reach federally funded schools that were not state actors. We think that the plain language of

> Title IX commands a different result: no school that receives federal funding may discriminate on the basis of gender. Therefore, we conclude that Title IX was enacted pursuant to a power that can reach non-state actors as well as state actors – the spending power.

Davis, 120 F.3d at 1398 n. 12 (citations omitted) (emphasis in original). *See also Rowinsky*, 80 F.3d at 1013 n. 14. The Court notes again the Supreme Court's recent decision in *Boerne*, that Congress' power under § 5 of the Fourteenth Amendment is limited to enforcing the substantive guarantees of the Fourteenth Amendment. *Boerne*, ___ U.S. at ___, 117 S.Ct. at 2163. It is well settled law that the Equal Protection Clause only protects against action by state-sponsored entities. *See Shelley v. Kraemer*, 334 U.S. 1, 13, 68 S.Ct. 836, 842, 92 L.Ed. 1161 (1948). Congress thus could not have enacted Title IX, which applies to private schools who receive federal funds, pursuant to its § 5 powers. If Congress truly intended to alter the meaning of the Equal Protection Clause, by affording protection against action taken by private entities, it would have overstepped its constitutional power in enacting Title IX. *See Boerne*, ___ U.S. at ___, 117 S.Ct. at 2164 (Congress' power under section 5 is "remedial" and designed to enforce provisions of the Fourteenth Amendment, not to "decree the substance of the Fourteenth Amendment's restrictions on the States."); *In re Creative Goldsmiths of Washington, D.C., Inc.*, 119 F.3d 1140, 1146-47 (4th Cir.1997).

Similarly, under present judicial and executive interpretation, the substantive provisions of Title IX reach beyond the Fourteenth Amendment's prohibitions

against gender discrimination. Under Title IX, defendants face potential statutory liability for non-intentional (i.e. disparate impact) discrimination. *E.g., Jeldness v. Pearce*, 30 F.3d 1220, 1231 (9th Cir.1994) (affirming district court's holding that paying male prisoners for attending educational classes, but not paying female prisoners for attending such classes "violated Title IX, where no intent was required, but not the Equal Protection Clause"); *Roberts v. Colorado State Bd. of Agriculture*, 998 F.2d 824, 832 (10th Cir.1993); *Mabry v. State Bd. of Comm. Coll. & Occ. Educ.*, 813 F.2d 311, 317 (10th Cir.1987); *Shuford v. Alabama State Bd. of Educ.*, 968 F.Supp. 1486, 1503-04 (M.D.Ala.1997); *Sharif by Salahuddin v. New York State Educ. Dept.*, 709 F.Supp. 345, 360-61 (S.D.N.Y.1989) (relying in part on the majority's decision in *Guardians Assoc. v. Civil Service Comm.*, 463 U.S. 582, 103 S.Ct. 3221, 77 L.Ed.2d 866 (1983)). *Cf. Guardians Assoc. v. Civil Service Comm.*, 463 U.S. 582, 103 S.Ct. 3221, 77 L.Ed.2d 866 (1983) (majority holding that proof of discriminatory effect suffices to establish liability when a suit is brought to enforce the regulations promulgated under Title VI, rather than statute itself). Contra, *Cannon v. University of Chicago*, 648 F.2d 1104, 1109 (7th Cir.1981). The Fourteenth Amendment, on the other hand, only recognizes intentional discrimination claims. *Washington v. Davis*, 426 U.S. 229, 241, 96 S.Ct. 2040, 2048, 48 L.Ed.2d 597 (1976). Again, the substantive provisions of Title IX go beyond the Fourteenth Amendment's prohibitions against gender discrimination. Given the Court's holding in *Boerne*, legislation which alters the meaning of the Equal Protection Clause cannot be said to be enforcing the Clause. *Boerne*, ___ U.S. at ___, 117 S.Ct. at 2164. Because Title IX

alters the meaning of the Equal Protection Clause by affording protection from a greater range of defendants and by reaching a greater range of conduct, this Court finds that Title IX could not have been passed pursuant to Congress' section 5 enforcement power. Title IX was properly enacted pursuant to Congress' spending-power, and its spending-power alone. Accordingly, the portion of § 2000d-7 which purports to abrogate the States' immunity from suit in this Court for actions brought pursuant to Title IX, is unconstitutional as exceeding Congress' powers under § 5 of the Fourteenth Amendment.

C.

Plaintiff argues that, even if Congress does not have the authority to abrogate Defendant's Eleventh Amendment immunity through its powers under § 5 of the Fourteenth Amendment, Congress retained the "power of the purse" and hence control over how federal funds should be spent pursuant to its Article I Spending Clause powers.

In deciding whether Congress can properly require states to waive their Eleventh Amendment immunity and answer in federal court for claimed violations of Title IX, in return for accepting federal funding for educational programs, this Court is guided by two Supreme Court cases which address the issue of conditional waiver. In *South Dakota v. Dole*, 483 U.S. 203, 107 S.Ct. 2793, 97 L.Ed.2d 171 (1987), the Supreme Court was faced with a challenge to 23 U.S.C. § 158, which provided that the Secretary of Transportation should withhold a percentage

of federal funds otherwise allocable from States "in which the purchase or public possession . . . of any alcoholic beverage by a person who is less than twenty-one years of age is lawful." 483 U.S. at 205, 107 S.Ct. at 2795. South Dakota permitted persons age nineteen or older to purchase beer. *Id.* South Dakota argued that 158 violates the constitutional limitations on congressional exercise of the spending power and violated the Twenty-First Amendment. *Id.* The Supreme Court held that, even though Congress might lack the power to impose a national minimum drinking age directly, encouragement to state action found in § 158 is a valid use of the spending power. 483 U.S. at 212, 107 S.Ct. at 2798.

Similarly, in *New York v. United States*, 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992), the Supreme Court was faced with a challenge to Congressional legislation regarding the disposal of radioactive waste. 505 U.S. at 150-53, 112 S.Ct. at 2415-16. One of the provisions required the States to develop, over a seven-year period, a plan for disposal of radioactive waste generated within and to be disposed within the state. *Id.* In order to provide an incentive for the States to make progress on creating their plans, Congress set forth in the legislation a series of "milestones." *Id.* If the States met the "milestones," they would be entitled to collect federal monies. *Id.* The Supreme Court held that this portion of the legislation, placing conditions (the achievement of "milestones") on the receipt of federal funds, is a valid conditional exercise of Congress' authority under the Spending Clause. 505 U.S. at 171-73, 112 S.Ct. at 2426-27.

These cases clearly demonstrate that Congress can condition a grant of federal funds on the States' willingness to consent to be sued in federal court. The fact that Congress is acting pursuant to its powers under the Spending Clause, an Article I power, is not an impediment, even after the Supreme Court's decision in *Seminole Tribe*.

> The breadth of [Congress' Spending Clause] power was made clear in *United States v. Butler* . . . where the Court, resolving a longstanding debate over the scope of the Spending Clause, determined that "the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution." Thus, objects not thought to be within Article I's "enumerated legislative fields," may nevertheless be attained through the use of the spending power and the conditional grant of federal funds.

South Dakota v. Dole, 483 U.S. at 207, 107 S.Ct. at 2796 (quoting *United States v. Butler*, 297 U.S. 1, 65-66, 56 S.Ct. 312, 319, 80 L.Ed. 477 (1936)). Thus, even though the Court in *Seminole Tribe* held that Congress does not have the authority pursuant to its Article I powers to simply abrogate the States' Eleventh Amendment immunity, Congress does have the power to require the States to waive their immunity pursuant to a valid exercise of its spending power.

However, Congress' ability under the Spending Clause to require states to waive their Eleventh Amendment immunity in return for federal monies is not unlimited. This power is subject to several general restrictions.

In order to determine whether Congress can properly require the Virginia to waive its immunity for suits brought under Title IX, as Plaintiff argues, this Court will examine whether Congress has violated any of these restrictions.

First, the exercise of the spending power must be in pursuit of "the general welfare." "In considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress." *South Dakota v. Dole*, 483 U.S. at 207, 107 S.Ct. at 2796 (citations omitted). Defendant does not argue that Title IX or the amendment contained in § 2000d-7 violates this restriction, and the Court finds that it does not.

Second, if Congress desires to condition the States' receipt of federal funds, it "must do so unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation." *Id.* (quoting *Pennhurst*, 451 U.S. at 17, 101 S.Ct. at 1540); *Virginia Dept. of Educ. v. Riley*, 106 F.3d 559, 566 (4th Cir.1997) (en banc). Defendant GMU argues that there is nothing in the text of Title IX or 42 U.S.C. § 2000d-7 which conditions the receipt of federal funds on the States' waiver of the Eleventh Amendment. GMU argues that, in the absence of such clear and unambiguous explicit statutory language, this Court cannot infer such a condition.

Plaintiff disagrees, and argues that under Title IX and § 2000d-7 it is abundantly clear that one of the conditions placed by Congress upon acceptance of federal funds

under Title IX is the loss of Eleventh Amendment immunity. Section 2000d-7 provides in pertinent part: "A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of . . . Title IX . . . or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal fund assistance." 42 U.S.C.A. § 2000d-7 (1994). The Court finds that this language is a clear and unequivocal expression of Congress' intent to condition the acceptance of federal funds on the States' agreeing to submit to the jurisdiction of the federal courts. The United States points to the legislative history of § 2000d-7, which supports this finding as well. "To the extent that the proposed amendment [§ 2000d-7] is grounded on congressional spending powers, [§ 2000d-7] makes it clear to states that receipt of Federal funds constitutes a waiver of their Eleventh Amendment immunity." Brief of the United States in Intervention (citing 131 Cong.Rec. at 22,346; 132 Cong.Rec. at 28,624).

The third restriction on Congress' spending power is that conditions on federal grants might be illegitimate if they are unrelated "to the federal interest in particular national projects or programs." *South Dakota v. Dole*, 483 U.S. at 207, 107 S.Ct. at 2796 (quoting *Massachusetts v. United States*, 435 U.S. 444, 461, 98 S.Ct. 1153, 1164, 55 L.Ed.2d 403). The Court finds that Title IX and § 2000d-7 easily satisfy this requirement, and Defendant does not argue otherwise.

Fourth, "other constitutional provisions may provide an independent bar to the conditional grant of federal funds." 483 U.S. at 208, 107 S.Ct. at 2796. Defendant GMU argues that this requirement means that Congress cannot

demand that the States surrender their Eleventh Amendment immunity as a condition of receiving federal funds. GMU cites *Federal Communications Comm'n v. League of Women Voters*, 468 U.S. 364, 104 S.Ct. 3106, 82 L.Ed.2d 278 (1984), in which the Supreme Court held that Congress could not demand that noncommercial television stations refrain from editorials as a condition of receiving federal funds. This Court finds the Federal Communications case is inapposite.

> The "independent constitutional bar" limitation on the spending power is not . . . a prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly. Instead, we think that the language in our earlier opinions stands for the proposition that the power may not be used to induce the States to engage in activities that would themselves be unconstitutional. Thus, for example, a grant of federal funds conditioned on invidiously discriminatory state action or the infliction of cruel and unusual punishment would be an illegitimate exercise of the Congress' broad spending power.

483 U.S. at 210-11, 107 S.Ct. at 2798. Because it is perfectly constitutional for a state to waive its Eleventh Amendment immunity, Congress' conditioning a state's receiving federal funds upon condition that it waive its Eleventh Amendment immunity, does not violate the "independent constitutional bar" limitation.

Finally, the Supreme Court has "recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.' " 483 U.S. at 211,

107 S.Ct. at 2798 (quoting *Chas. C. Steward Machine Co. v. Davis*, 301 U.S. 548, 590, 57 S.Ct. 883, 892, 81 L.Ed. 1279 (1937)). In *South Dakota v. Dole*, the Court found that all South Dakota would lose if it chose to keep its minimum drinking age at nineteen, rather that at age twenty-one as Congress desired, was 5% of the funds otherwise obtainable under specified highway grant programs. *Id.* Defendant does not argue that the financial inducement provided by federal monies offered under Title IX funding are so great as to be coercive, nor has Defendant provided the Court with any evidence of the amounts of money provided to the States for educational programs which are required to comply with Title IX. This Court, therefore, cannot find that the inducement offered by Congress can be called "coercive" in this case.

The Court will briefly mention Defendant's final argument with regards to the waiver issue. GMU argues that the mere receipt of federal funds does not constitute waiver of the Eleventh Amendment, and that waiver must be overt and explicit (such as a statutory declaration by the General Assembly) GMU argues that waiver cannot be implied. Quite the contrary, waiver may be implied, but only where the Congressional legislation at issue is clear that it is conditioning receipt of the federal funds on the waiver. As the Court discussed, *supra*, through enactment of § 2000d-7, Congress clearly indicated its intent to condition the States' receipt of federal funds upon an accounting for the spending of those funds in federal court.

Under Title IX and 42 U.S.C. § 2000d-7, properly enacted pursuant to Congress' powers under the Spending Clause, it is clear that one of the conditions placed by

Congress upon acceptance of federal funds under Title IX is the waiver of Eleventh Amendment immunity. Accordingly, Defendant's 12(b)(1) Motion to Dismiss Counts I and II for lack of subject matter jurisdiction is DENIED.

III.

Defendant Dean Girard Mulherin ("Mulherin") has filed a Motion for Summary Judgment, arguing that no disputed facts remain regarding Count IV.

A.

Summary judgment is proper if, viewed in the light most favorable to the nonmoving party, "the pleadings, depositions, answers to interrogatories, and admissions of file, together with the affidavits, if any, show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). *See Ross v. Communications Satellite Corp.*, 759 F.2d 355, 364 (4th Cir.1985). The nonmoving party is entitled to the most favorable inferences that may reasonably be drawn from the forecast evidence, *Ross*, 759 F.2d at 364, but it "cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another." *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir.1985). The essence of the inquiry the court must make is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 106 S.Ct. 2505, 2511-12, 91 L.Ed.2d 202 (1986). Summary judgment is proper "if the evidence is such that

a reasonable jury could [not] return a verdict for the nonmoving party." *Id.* at 248.

B.

In its Order dated January 22, 1998, this Court denied Mulherin's Motion to Dismiss this due process claim. The Court denied Mulherin's motion at that time because Litman had alleged in her Complaint that, "[a]t the conclusion of the first day of the proceedings, and prior to the presentation of Litman's defense, a board member stated, 'I will make it clear that no new evidence will be presented. All evidence in this case is before us right now.' " Complaint at ¶ 97. This Court found that, if Plaintiff's allegations were true and it were also true that Litman did not have the opportunity to present her side during the first day of the hearing or at some other time, then this would be a clear due process violation of which a person in Dean Mulherin's position as Judicial Administrator should have known.

After the January 22 Memorandum Opinion and Order was mailed to the parties, counsel for Plaintiff mailed a letter to this Court:

> I write to bring to the Court's attention an apparent misunderstanding of the facts alleged by the Plaintiff in regard to the above referenced matter.
>
> At page seventeen of the Court's Memorandum Opinion of January 22, 1998, the Court denied Defendant Mulherin's Motion to Dismiss based upon the Court's belief that the Plaintiff had no opportunity to present her defense to the Student Judicial Board at her expulsion hearing.

> . . . [I]t was not and is not Litman's position or allegation that she was entirely precluded from presenting her defense.

Letter from Annette Kay Rubin, counsel for Plaintiff, dated January 28, 1998.

The Court finds that the pertinent facts are thus no longer in dispute. Although Litman was not allowed to put on as much evidence as she would have liked, it is now uncontroverted that she was allowed to testify for several hours. Accordingly, Dean Mulherin's Motion for Summary Judgment is GRANTED.

IV.

Plaintiff Litman asks this Court to exclude certain healthcare providers from the requirement of preparing a written report pursuant to Fed.R. of Civ.P. 26(a)(2)(B). Litman argues that only her treating physicians will be called to testify as to their diagnosis, observations, and opinions with respect to her medical and mental health in accordance with their treatment records of her. Plaintiff states that none of the physicians will be asked to testify as to matters outside the scope of their examination and treatment of the Plaintiff. Defendant Norris objects, and argues that it is unfair to "permit a party to employ a physician who treated an injured party to provide testimony extending beyond simply the care of the plaintiff to classic expert opinion regarding causation and prognosis" without submitting an expert report. Response on Behalf of Defendant Eugene M. Norris in Opposition to Plaintiff's Motion to Exclude Healthcare Providers from the Requirement of Preparing a Written Report Pursuant

to Fed.R.Civ.P. 26(a)(2)(B) at 2 (citing *Thomas v. Consolidated Rail Corp.*, 169 F.R.D. 1 (D.Mass.1996)).

The Court finds a recent decision from the Norfolk Division of this Court instructive:

> If a treating physician forms an opinion of the causation of an injury to a patient and the prognosis of the patient's condition during the treatment then such opinion may be expressed by the treating physician without the necessity of a report under Fed.R.Civ.P. 26(a)(2)(B). . . . Defendants may still discover those opinions through interrogatories, requests for production of documents, and depositions of the treating physicians. However, if a physician, even though he may be a treating physician, is specially retained or employed to render a medical opinion based on factors that were not learned in the course of the treatment of the patient, then such a doctor would be required to present an expert written report.

Hall v. Sykes, 164 F.R.D. 46, 48-49 (E.D.Va.1995).

Plaintiff has represented to this Court that the treating physicians who will testify at trial will confine their testimony to factors which were learned in the course of their treatment of Plaintiff. If the testimony were to go beyond this at trial, and expert reports had not been filed, it would be proper to exclude this portion of the testimony at that time in trial. Accordingly, Plaintiff's Motion to Exclude Healthcare Providers from the Requirement of Preparing a Written Report Pursuant to Fed.R.Civ.P. 26(a)(2)(B) is GRANTED.

V.

Plaintiff also asks this Court to amend and reverse its holding with respect to Count III of her Complaint, alleging Deprivation of Free Speech Rights, and with respect to Count V, alleging Deprivation of Equal Protection Rights, each against Defendants Orsak and Mulherin.

With regards to this Court's dismissal of Count III, Litman argues that this Court erroneously applied the "public concern" test, which governs free speech in an employer/employee state relationship, and not the test in *Tinker v. Des Moines Ind. Comm. School Dist.*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), which governs student protected speech and gives the state the power to control students' speech only if it "substantially interferes with school discipline or the rights of others." Even if this Court analyzed Litman's claim by looking at the Court's holding in *Tinker*, the Court would still dismiss Count III. Again, this Court dismissed Count III based on a finding that Orsak and Mulherin were entitled to qualified immunity. The Supreme Court in *Tinker* stated that "conduct by the student, in class or out of it, which for any reason – whether it stems from time, place, or type of behavior – materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech." *Tinker*, 393 U.S. at 513, 89 S.Ct. at 740. Part of the qualified immunity test is whether a reasonable person in the defendant's position would have known that his actions violated the plaintiff's First Amendment rights. *See Pritchett v. Alford*, 973 F.2d 307, 312 (4th Cir.1992). Defendants in this case could reasonably have viewed Litman's actions of sending numerous e-mails and other

writings to professors regarding her claims of sexual harassment as highly disruptive of the professors' work, and thus are entitled to qualified immunity even under the standard Plaintiff urges this Court to accept. Accordingly, Plaintiff's Motion to Reconsider the dismissal of Count III is DENIED.

Plaintiff's Motion to Reconsider the dismissal of Count V is without merit and is, accordingly, DENIED.

ORDER

For the reasons stated in the Memorandum Opinion, it is hereby ORDERED that:

(1) Defendant George Mason University's Motion to Dismiss Counts I and II is DENIED;

(2) Defendant Dean Girard Mulherin's Motion for Summary Judgment is GRANTED;

(3) Plaintiff's Motion to Exclude Treating Healthcare Providers from the Requirement of Preparing a Written Report Pursuant to Fed.R.Civ.Pro. 26(a)(2)(B) is GRANTED;

(4) Plaintiff's Motion to Reconsider the Court's ruling dismissing her Equal Protection claim as to Defendants Orsak and Mulherin is DENIED;

(5) the Clerk of the Court shall forward copies of this Order and Memorandum opinion to all counsel of record.